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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 224

FRED P. HAYWARD ET AL.,
Petitioners,

vs.

CITY OF CORPUS CHRISTI.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID M. WOOD,
MARCELLUS ECKHARDT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. 224

FRED P. HAYWARD ET AL.,

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vs.

CITY OF CORPUS CHRISTI.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Fred P. Hayward, Fred W. Hubbell and Francis P. Sears respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition presents for review the refusal of the United States Circuit Court of Appeals for the Fifth Circuit, to recognize as final a prior judgment rendered by a State court in Texas in an action involving the identical subject matter and issues between the same parties or their privies and the failure of the United States Circuit Court of Ap-

peals to apply to the case at bar the law of the State of Texas as expounded by decisions of the courts of that State.

On September 24, 1932, one Harris, a taxpayer of the City of Corpus Christi, Texas, filed a petition in the 117th Judicial District Court of Nueces County, Texas, seeking to enjoin the City of Corpus Christi from making further payments upon three outstanding series of bonds of that city, being the bonds sued upon in the case at bar, upon the grounds that the bonds had been illegally issued and were void (R. 93-117). The petition was filed by Harris, in his capacity as a taxpayer of the City of Corpus Christi, on behalf of himself and on behalf of the City of Corpus Christi, and in addition to seeking an injunction also prayed that damages be recovered in favor of the City of Corpus Christi against the various defendants, named in that suit, for breach of contract and for payments theretofore made on account of such outstanding bonds and that the bonds be declared void. The bonds which were the subject matter of that suit and which are also the subject matter of this suit, were obligations of the city payable out of the revenues of the city's water system and were secured by trust indentures between the city and three separate trustees (R. 593-627, 636-669, 758-803). In his suit Harris named as parties defendant various members of the governing body of the city and their predecessors in office, as well as the city itself, the contractor to whom the bonds were originally issued and the three trustees appointed by the indentures securing the bonds. The trustees for the bondholders in that suit attacked the petition of the taxpayer by general demurrer and also by special exceptions going to the merits of the case and the right of Harris to maintain the suit (R. 899-934, 319-320). The city answered the petition by stating that it was holding the revenues of the water system "to abide the judgment of the court" and that it stood "ready and

willing to abide the judgment of the court on final determination of the said suit" (R. 117-119). After many amendments to the petition had been allowed the case was finally disposed of on the taxpayer's fourth amended petition and the trustees' general demurrer and special exceptions, and the court rendered its judgment sustaining separately the general demurrer and special exceptions and dismissing the taxpayer's petition with leave to further amend expressly denied (R. 472-474). The taxpayer appealed from the judgment of the lower court to the Court of Civil Appeals and the City of Corpus Christi, pursuant to a resolution of its City Council, filed with the Court of Civil Appeals its motion requesting that the judgment of the trial court be reversed and by that motion expressly joined in all the requests and briefs filed by the taxpayer (R. 474-475, 120-124). The Court of Civil Appeals affirmed the judgment of the lower court "in all things" (R. 140) and rendered an opinion reported as *City of Corpus Christi* v. *Flato*, 83 S. W. (2d) 433 (R. 125-138, Appendix 2). A writ of error to the Supreme Court of the State of Texas sued out by the taxpayer was dismissed by that court (R. 476).

After the decision in the taxpayer's action the city paid interest on the bonds but failed to pay the interest installment due February 1, 1937, and thereafter the petitioners in the case at bar filed the instant suit against the city in the United States District Court for the Southern District of Texas to recover judgment upon the February 1, 1937 interest coupons appurtenant to the identical bonds involved in the taxpayer's action. The trial court awarded judgment in favor of petitioners (R. 178) predicated upon its findings of fact and conclusions of law (R. 146-178). The Circuit Court of Appeals reversed that judgment, holding the decision of the Texas Court of Civil Appeals rendered in the taxpayer's action to be mere *obiter dictum* and the

judgment in the taxpayer's action not to be conclusive because, in the opinion of the Circuit Court of Appeals, the principles of law upon which the judgment had been predicated, were overruled in a later State court decision rendered in a different case (R.1040-1043).

The bonds had been issued by the city for the purpose of acquiring additional water powers pursuant to Articles 1111 to 1118, Revised Civil Statutes of Texas, 1925, as amended (Appendix 1). The city received full value for the bonds (R. 460-465). There is no claim of fraud in the issuance of the bonds or lack of consideration. The bonds were originally issued in three series, one series aggregating $2,000,000, dated August 1, 1927 (R. 583-592), one series aggregating $350,000, dated August 1, 1928 (R. 627-635), and one series aggregating $375,000, dated September 1, 1929 (R. 670-691). All three series of bonds were issued in pursuance of a contract entered into between the City of Corpus Christi and Smith Bros., Inc. (R. 580-582, 737-742), for the purpose of acquiring an impounding and storage reservoir, a filtered water reservoir, a pumping station and elevated water tank or tower, as well as the necessary appurtenances thereto and reinforcement of the water mains to accommodate the additional water supply resulting from the aforementioned projects, and to provide sufficient moneys for the purchase by the city of the lands needed for each of such purposes. Thereafter, the City of Corpus Christi authorized an issue of Waterworks Revenue Refunding Bonds aggregating $725,000, dated September 2, 1929, for the purpose of refunding the $350,000 of bonds of the series of 1928 and the $375,000 of bonds of the Series of 1929 (R. 742-756). The entire series of 1929 and all but $290,000 of the series of 1928 were refunded by this issue (R. 161). Each series of bonds was secured by a trust indenture made between the City of Corpus Christi and a bank or trust company, conveying for the benefit of the hold-

ers of the respective series of bonds, a first lien upon the waterworks system of the City of Corpus Christi, and upon the net revenues of that system and appointing such trust company trustee for the bondholders (R. 593-627, 636-669, 758-803).

The bonds were delivered to Smith Bros., Inc., the contractor, from time to time as the contract was performed and were resold by Smith Bros., Inc., to bond dealers who distributed them widely among various parties, who purchased them prior to their maturity at prices in excess of their par value and without notice of any defect or infirmity therein (R. 162, 213-214, 216, 252-253, 274-284). The entire contract was completed by Smith Bros., Inc., and the work was formally accepted by the City of Corpus Christi by ordinance of its City Council (R. 460-465). Thereafter, a portion of the dam constructed by Smith Bros., Inc., for the purpose of creating the impounding reservoir under the contract above mentioned was damaged. The damaged part of the dam measured approximately 200 feet. The entire dam measured approximately 4,000 feet (R. 263-264). Thereupon the city applied to the Reconstruction Finance Corporation for a loan to enable it to repair the damage to the dam and to improve it by installing sluice gates in that part of the dam which was damaged. The Reconstruction Finance Corporation advised the city that it might obtain such a loan provided the holders of the then oustanding bonds agreed to certain conditions, among which was a waiver by the holders of such bonds of their prior lien upon the waterworks plant of the city and upon its net revenues (R. 217-218). In order that such a waiver might be obtained from the holders of the outstanding bonds the petitioners, together with Robert L. Fischer and Natt T. Wagner, constituted themselves members of a committee of holders of the outstanding bonds, under a Deposit Agreement, dated November 10, 1932, and amended December 6, 1932

(R. 426-450). Robert L. Fischer resigned in 1932 and was succeeded by Leslie R. Martin, who later resigned. Natt T. Wagner also resigned as a member of the committee and the vacancies in the membership of the committee created by these resignations were never filled, leaving the petitioners the only members of the committee (R. 222, 231).

On or about March 10, 1933, the City of Corpus Christi adopted an ordinance (R. 466-471) reciting that the Reconstruction Finance Corporation had agreed to purchase from the city $500,000 of its Water Plant Repair Revenue Bonds for the purpose of enabling the city to repair the damage to the dam, above referred to, upon the condition, however, that a plan of readjustment, satisfactory to the Reconstruction Finance Corporation, be formulated by the above mentioned bondholders' committee and upon the plan being made effective and binding upon the holders of the city's then outstanding bonds which were secured by liens upon the city's waterworks plant and upon its net revenues. The ordinance further recited that the holders of outstanding bonds of each of said three series had deposited such bonds with the bondholders' committee, under the Deposit Agreement, in amounts satisfactory to the Reconstruction Finance Corporation, and thereby subjected their bonds to the plan of readjustment, and, to consummate such plan of readjustment, it was necessary to amend the indentures securing the outstanding bonds of each series by executing supplemental indentures stating the modifications and changes of said outstanding bonds made by the plan of readjustment. Thereafter the city executed three, separate, supplemental indentures, each dated as of February 1, 1933, with the banks and trust companies, which were named in the respective indentures, securing the three series of outstanding bonds above mentioned (R. 491-514, 537-557, 515-536). Each of the supplemental indentures referred to provided that the lien of the outstanding bonds was subordinated to

the lien of $500,000 Water Plant Repair Revenue Bonds to be issued by the City of Corpus Christi to the Reconstruction Finance Corporation; that the interest rate on the bonds of each said series was modified so that interest maturing after August 1, 1932 and prior to February 1, 1946 would be payable at the rate of four per cent in cash and the remaining two per cent in non-interest bearing scrip, which would be payable only as and when there existed surplus sinking fund moneys and not otherwise. Reductions were made in the sinking fund requirements for the bonds of each of said series and the maturities of the bonds of each of said series were postponed and the bonds made subject to redemption prior to their maturity.

As provided in the supplemental indentures, the bonds and the coupons attached thereto were stamped with endorsements evidencing the changes and modifications in their terms provided by the supplemental indentures. The Reconstruction Finance Corporation thereupon made its loan to the City of Corpus Christi by purchasing $500,000 Water Plant Repair Revenue Bonds. The city paid interest upon the outstanding subordinated bonds of the three series above mentioned, at the reduced rate and in accordance with the terms of the plan of readjustment until February 1, 1937 when it refused to pay the interest at the reduced rate, due that date, whereupon petitioners filed their complaint in this action to reduce such interest claims to judgment (R. 30-72). The defendant City of Corpus Christi filed an answer (R. 72-87) setting forth various defenses, among which were that Articles 1111 to 1118 inclusive, of the Revised Civil Statutes of Texas 1925 were not applicable to the City of Corpus Christi, and that, if such sections were applicable, the bonds were invalid for the reason that they had not been voted by the qualified voters of the city,—the identical objections raised in the taxpayer's suit in the State court. The petitioners filed a reply (R. 88-139) to the de-

fendant's answer pleading that the issues raised in this case had been finally and conclusively adjudicated in the taxpayer's suit in the State court; that the City of Corpus Christi had received, and was retaining the properties, which it acquired as a result of the issuance of the three series of bonds above mentioned, and that it had made no offer of restitution of these properties and that under such circumstances the city was estopped to deny its liability upon the bonds, through the issuance of which it acquired such properties; and that the city was estopped to assert the defenses interposed by its answer by virtue of recitals contained in the bonds and by virtue of its continued recognition of the validity of the bonds through the payment of the interest thereon and the readjustment thereof as provided in the aforesaid supplemental indentures. The disposition of the case by the District Court and the Circuit Court of Appeals has heretofore been set forth.

B.

Statement of the Basis of the Court's Jurisdiction.

1. This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, by virtue of the provisions of Section 240(a) of the Judicial Code as amended (28 U. S. C. A. Section 347a). Federal jurisdiction is based upon diversity of citizenship (R. 147).

2. The date of the judgment of the Circuit Court of Appeals to be reviewed is April 20, 1940 (R. 1043). Appended hereto is a copy of the opinion of the Circuit Court of Appeals (Appendix 3). On June 13, 1940, rehearing was denied by the Circuit Court of Appeals (R. 1057).

3. Appended hereto is the opinion of the Texas Court of Civil Appeals in the companion case of *City of Corpus Christi* v. *Flato* (Appendix 2).

4. This is a proper case for the exercise by this Court of its power of review (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64). Additional authorities are cited in the brief.

C.

Statement of the Questions Presented.

1. Did the Circuit Court of Appeals for the Fifth Circuit err in holding that the prior judgment of the State court rendered in *City of Corpus Christi* v. *Flato*, 83 S. W. (2d) 433, was not *res judicata* of the issues involved in the case at bar?

2. Did the Circuit Court of Appeals for the Fifth Circuit err in holding that the decision of the State court in *City of Corpus Christi* v. *Flato, supra,* was not binding upon it because it was merely *obiter dictum* and was later overruled by a decision of the Supreme Court of Texas, rendered in another case?

3. Did the Circuit Court of Appeals for the Fifth Circuit err in holding that the City of Corpus Christi was not estopped to deny the validity of the bonds by virtue of accepting and retaining the benefits received by it from the issuance of such bonds?

4. Did the Circuit Court of Appeals for the Fifth Circuit err in holding that the City of Corpus Christi was not estopped to deny the validity of the bonds by virtue of its affirmative action in the case of *City of Corpus Christi* v. *Flato, supra,* and by its continued recognition of the validity of such bonds through the payment of interest thereon, its dealings with the bondholders at the time such bonds were subordinated to the bonds sold to the Reconstruction Finance Corporation, and by the recitals of due and proper action contained in each of the bonds?

5. Did the Circuit Court of Appeals for the Fifth Circuit err in holding the bonds invalid upon the grounds that Articles 1111 to 1118, Revised Civil Statutes of Texas 1925, as construed by the State courts, required the bonds to be voted by the qualified voters of the City of Corpus Christi?

D.

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals that it was not bound by the decision of the State court in *City of Corpus Christi* v. *Flato, supra,* is violative of Section 34 of the Federal Judiciary Act (28 U. S. C. A. Sec. 725).

2. The decision of the Circuit Court of Appeals holding that that part of the judgment rendered upon the merits in the case of *City of Corpus Christi* v. *Flato, supra,* was *obiter dictum,* is in conflict with the decisions of this Court, the Courts of Appeals of other circuits, the courts of the State of Texas and with the weight of authority throughout the country. In fact it is in conflict with every decided case, which your petitioners have been able to discover, after a most painstaking investigation of the authorities.

3. The decision of the Circuit Court of Appeals holding that the judgment in *City of Corpus Christi* v. *Flato, supra,* was not binding upon it because the judgment was that of an intermediate appellate court and was overruled by a later decision of the Supreme Court of Texas, rendered in a different case, is in conflict with the decisions of this Court, of the Courts of Appeals of other circuits, of the courts of the State of Texas and with the great weight of authority throughout the country.

4. In refusing to affirm the decision of the United States District Court that the City of Corpus Christi was estopped to deny the validity of the bonds by accepting, holding and enjoying the benefits received from the issuance of the

bonds, the Circuit Court of Appeals has held directly contrary to the decisions of the Supreme Court of Texas, which are binding upon the Federal courts, under the decision of this Honorable Court, in the case of *Erie Railroad* v. *Tompkins*, 304 U. S. 64.

5. In refusing to affirm the decision of the United States District Court that the bonds are legal and valid obligations, the Circuit Court of Appeals has rendered a decision in conflict with the decision in the case of *City of Corpus Christi* v. *Flato, supra*, which the Supreme Court of Texas refused to reverse, thus resulting in the identical bonds being held invalid by the Federal court and valid by the State court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 9213, *City of Corpus Christi, Appellant* v. *Fred P. Hayward et al., Appellees*, and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

FRED P. HAYWARD,
FRED W. HUBBELL,
FRANCIS P. SEARS,
Petitioners;
DAVID M. WOOD,
MARCELLUS G. ECKHARDT,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

A.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 111 F. (2d) 637 and is appended hereto (Appendix 3). The District Court rendered no written opinion but its findings of fact and conclusions of law appear in the record at pages 146 to 178.

B.

Statement of Case.

A sufficient statement of the case has been made in the petition and in the interests of brevity will not be repeated at this point.

C.

Assignment of Errors.

Petitioners assign as errors the rulings of the Circuit Court of Appeals for the Fifth Circuit upon the questions set forth in the petition.

D.

ARGUMENT.

Point I.

THE JUDGMENT RENDERED BY THE COURTS OF TEXAS IN THE CASE OF CITY OF CORPUS CHRISTI V. FLATO, IS RES JUDICATA OF THE ISSUES INVOLVED IN THIS CASE.

Point II.

THE DECISION IN CORPUS CHRISTI V. FLATO WAS NOT OVERRULED BY THE DECISION IN RADFORD ET AL. V. CITY OF CROSS PLAINS.

Point III.

THE CITY OF CORPUS CHRISTI IS ESTOPPED TO DENY THE VALIDITY OF THE BONDS BY VIRTUE OF ACCEPTING AND RETAINING THE BENEFITS DERIVED BY IT FROM THE ISSUANCE OF THE BONDS.

Point IV.

THE BONDS WERE LEGALLY ISSUED AND THE CITY MAY NOT DISPUTE THEIR VALIDITY.

Point I.

The judgment rendered by the courts of Texas in the case of City of Corpus Christi v. Flato, is res judicata of the issues involved in this case.

The case of *City of Corpus Christi* v. *Flato*, hereafter called the "*Flato* Case," was a suit in equity which involved the validity of the very bonds which are the subject-matter of the case at bar. The City of Corpus Christi was made a party in that suit (R. 93-94). It appeared in the case, filed an answer and joined in the appeal to the Texas Court of Civil Appeals, seeking to reverse the judgment rendered by the trial court (R. 117-119, 474-475, 120-124). The bondholders were represented in the case by the trustees named in the indentures executed by the city to secure the payment of the bonds. The issues presented to the court in that case were identical with the issues in the case at bar. That suit, therefore, involved the same issues which are involved in the case at bar, between the same parties or their privies, and a final judgment was rendered therein by a court of competent jurisdiction. Under the circumstances, that judgment is *res judicata* of the issues involved in the case at bar if it was a decision upon the merits. The Circuit Court of Appeals held that that part of the judgment which went to the merits in the *Flato* case was a mere

dictum, and, therefore, the judgment was not *res judicata*. We submit that such ruling of the Circuit Court of Appeals was erroneous on the ground that there is no such thing as *obiter dictum* in a judgment.

To determine whether a judgment has been rendered upon the merits, it is necessary to examine the judgment itself. In the *Flato* case the trial court, after many amendments to the petition had been allowed, finally disposed of the case upon the fourth amended petition and the trustees' general demurrer and special exceptions. It rendered its judgment sustaining separately the general demurrer and the special exceptions, many of which went to the merits, and dismissed the petition, denying leave to further amend (R. 472-474). An examination of the judgment discloses beyond question that the trial court intended to render a decision upon the merits. It was not a mere judgment dismissing the complaint, but ruled upon the special exceptions and expressly declared that the general demurrer should be sustained. In short, the court rendered its judgment upon two grounds.

When a court renders a judgment upon two grounds, neither ruling of the court is *obiter dictum*. This Court said in *Union Pacific Company* v. *Mason City and Fort Dodge Railroad Co.*, 199 U. S. 160:

> "A distinct ruling on any question fairly arising in a trial is not *obiter dictum*, and where the judgment rests upon two grounds, either being sufficient to sustain it, and the appellate court sustains it on both grounds, the ruling on neither is *obiter* but each is the ruling of the court and of equal validity with the other."

The reason for this principle of law is well stated by the Court of Appeals of the State of New York, in *Sheldon* v. *Edwards*, 35 N. Y. 279. The judgment pleaded as a bar in that case was very similar to the judgment in *City of Corpus Christi* v. *Flato*. Separate rulings had been rendered upon

the merits and upon a plea of abatement. In holding the judgment *res judicata*, the Court said:

> "The court found each issue for the defendant and directed judgment accordingly which was entered. Can any court assume to say that judgment was given upon one issue more than upon another when the record shows it was given alike upon all? Can it be denied that each of these issues was tried and adjudged? What court then can detract from the power or force of the consequences flowing from such judgment upon these issues?"

No decision to the contrary has been found in any jurisdiction in this country, although the question has many times been presented to the courts for determination. See

United States v. *Chamberlin*, 219 U. S. 250, at page 262;
Ex parte Young, 209 U. S. 123, at p. 153;
Kenneth S. MacAffer v. *Boston and Maine Railroad*, 268 N. Y. 400;
Thompkins v. *Missouri, K. & T. Ry. Co. et al.*, 211 Fed. 391, at p. 399;
Bates v. *Taylor*, 87 Tenn. 319, 11 S. W. 266;
Kiernan v. *City of Portland et al.*, 57 Oregon 454; 112 Pac. 402;
State ex rel. Bailey v. *Brookhart*, 113 Iowa 250; 84 N. W. 1064;
King v. *Pauly et al.*, 159 Calif. 549; 115 Pac. 210;
Watson v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942;
New York Cent. & H. R. R. Co. v. *Price*, 159 Fed. 330;
Chicago, B. & Q. R. Co. v. *Board of Sup'rs of Appanoose County*, 182 Fed. 291;
Kessler et al. v. *Armstrong Cork Co.*, 158 Fed. 744;
Williams v. *Arlington Hotel Co.*, 15 F. (2d) 412;
Van Dyke v. *Parker*, 83 F. (2d) 35;
State ex rel. Weast v. *Moore*, 164 Mo. App. 649; 147 S. W. 551;

Spratt v. *Helena Power Transmission Co.*, 37 Mont. 60; 94 Pac. 631, at p. 634;
Duncan v. *Brown*, 18 New Mexico 579; 139 Pac. 140;
Mayor etc. of City of Paterson v. *East Jersey Water Co.*, 74 N. J. E. 49; 70 Atl. 472, at p. 488;
East Bay Municipal Utility Dist. v. *Kieffer et al.*, 99 Cal. A. 240; 279 Pac. 178;
United States v. *Title Insurance & Trust Co., et al.*, 265 U. S. 472.

We respectfully submit, therefore, that the trial court, in the *Flato* case, rendered a decision upon the merits.

It is the judgment in the case which is *res judicata*, not the opinion of the court which rendered it, or even the opinion of an appellate tribunal which affirms the judgment.

Mayfield Co. v. *Rushing, et al.*, 127 S. W. (2d) 185;
Sheldon v. *Edwards, supra;*
Freeman on Judgments, Fifth Edition, Sec. 772.

A question expressly determined by a court, whose decree is affirmed on appeal is *res judicata* between the parties, although the question was not considered by the appellate court whose affirmance was placed upon other grounds.

Russell v. *Russell*, 134 Fed. 840;
People v. *Skidmore*, 27 Calif. 287;
Simonds v. *Norwich Union Idemnity Co.*, 73 F. (2d) 412;
People v. *Waite*, 243 Ill. 156; 90 N. E. 183;
24 *Am. & Eng. Ency. of Law* (2nd Ed.) 795.

The Circuit Court of Appeals seems to have given little consideration to the judgment rendered in the *Flato* case. It does not mention the judgment in its opinion, but confines itself to a discussion of the opinion which was ren-

dered by the Texas Court of Civil Appeals, affirming the judgment.

But the opinion of the Texas Court of Civil Appeals (Appendix 2) affirmatively shows that that court intended to affirm the judgment upon the merits. It stated in its opinion that the appeal presented for review the trial court's action in sustaining the *general* demurrer. The appellate court first discussed that part of the taxpayer's petition which prayed for a judgment for money damages arising out of an alleged breach of contract and upon this point held that such an action for damages could not be prosecuted by a taxpayer in the absence of a prior demand upon the city to institute such a suit. The court held that the same rule applied to that part of the petition in so far as it prayed for a judgment against the members of the governing body of the city and other city officials for having previously paid out money on account of outstanding bonds. Upon this question the court analyzed the provisions of the charter of the city and held that they did not give a taxpayer the right to institute an action for money damages to which the city might be entitled in the absence of an allegation that prior demand was made upon the city to institute the suit. The court then directed its attention to that part of the taxpayer's petition praying for an injunction restraining the making of any further payments on the bonds and seeking a declaratory judgment establishing their invalidity. With respect to this relief the court first discussed the matter of laches in seeking it and pointed out that the taxpayer was guilty of laches. The court then discussed the merits of the case and, against the very objections now raised in the case at bar, it held the bonds to be valid obligations of the city. That the judgment and decision of the Texas Court of Civil Appeals was intended to be on the merits is further demonstrated by the fact

that the motion for rehearing, filed in the Court of Civil Appeals, specifically objected because the judgment was rendered on the merits, instead of being rendered without prejudice, so that it could not be pleaded as *res judicata* in any subsequent suit (R. 977). This Court has held that that was a proper ground for appeal.

House v. *Mullen,* 22 Wall. 42;
Goodman v. *Niblack,* 102 U. S. 556, 563;
Kendig v. *Dean,* 97 U. S. 423.

The very fact that the Court of Civil Appeals refused to reform the judgment, in the face of express objection that the judgment had been rendered upon the merits, instead of having been rendered without prejudice, conclusively demonstrates that that court intended to affirm the judgment upon the merits.

The petitioner in the Flato Case, after the decision of the Court of Civil Appeals had been rendered, applied to the Supreme Court of Texas for a writ of error. As the appeal involved the interpretation of a Texas statute the Supreme Court had the right to issue a writ of error, had it believed the judgment rendered by the courts below to be erroneous, but under the statutes of Texas when the Supreme Court is satisfied that the *judgment* of the Court of Civil Appeals is correct, but it is not satisfied that the *opinion* of the Court of Civil Appeals correctly declares the law *in all respects,* the Supreme Court is required to dismiss the application for a writ of error for want of jurisdiction.

Texas Rev. Civ. Stat. 1925, Art. 1728, as amended by Ch. 144, Laws 1927; Vernon's Texas Stat. 1936, Art. 1728.

The Supreme Court of Texas dismissed the application for a writ of error for want of jurisdiction (R. 476), thereby

making the judgment of the District Court, as affirmed by the Court of Civil Appeals, a final judgment in the case; *Snelson* v. *Drane,* 134 S. W. (2d) 445; and the correctness of that judgment can no longer be inquired into. *Hetkes* v. *Gehret, et al.,* 16 S. W. (2d) 395; 36 S. W. (2d) 700.

The appellant in the Flato Case thereupon made a motion for a rehearing in the Supreme Court of Texas, assigning a number of errors going to the merits of the cause, among which was the contention that the Court of Civil Appeals had committed an error of substantive law in affirming the judgment of the trial court sustaining the general demurrer, instead of reforming the judgment so as to show that the suit was dismissed upon grounds which would not go to the merits (R. 1033-1035). The Supreme Court of Texas denied a rehearing, and it would therefore seem beyond question that that court likewise intended to affirm the judgment of the trial court upon the merits.

There can be no question that the trial court in the Flato Case, rendered a judgment sustaining the general demurrer, and that judgment was affirmed by the Court of Civil Appeals and by the Supreme Court of Texas. The effect of that judgment as *res judicata* is no doubt a question of State law. *Oklahoma Packing Co. et al.* v. *Oklahoma Gas & Electric Co. et al.,* 309 U. S. 4. But the law of Texas in this respect is no different from that prevailing, generally, throughout the country. The Texas courts have held that a judgment of dismissal, after sustaining a general demurrer to the petition, is *res judicata* of the merits.

Dixon v. *Zadek,* 59 Texas 529;

Kempner v. *First Nat'l Bank of Crockett,* 44 Tex. Civ. App. 500, 99 S. W. 112;

McKinney et al. v. *Stoneham et al.,* 35 S. W. (2d) 450;

Texas Nat'l Bank v. *Zellers, et al.,* 75 S. W. (2d) 890.

This is also true of a judgment which sustains both special exceptions and a general demurrer.

Bomar v. *Parker,* 68 Tex. 435, 4 S. W. 599;
Carpenter v. *Landry et al.,* 45 Tex. Civ. App. 506, 101 S. W. 277;
Jefferson v. *Scott,* 135 S. W. 705;
Galbreath v. *Farrell,* 275 S. W. 238;
Snelson v. *Drane,* 134 S. W. (2d) 445.

In *Bomar* v. *Parker, supra,* in an opinion of the Commission of Appeals, which was adopted by the Supreme Court of Texas, it was said that:

> "A judgment on demurrer may be as conclusive as a former adjudication as would a judgment on the facts; but, to have that effect, it must clearly appear that the demurrer went to the merits of the action or defense; otherwise it would be presumed that the objection was to the form, and not to the merits. Wells, Res. Adj., Sec. 446. Here there were general and special exceptions taken, and all sustained, to Bomar's petition and amendments; and, upon further amendment, curing in part the objection pointed out by the special exceptions, the general and special exceptions were again renewed, and were all sustained. An examination of the pleadings in that case very clearly and distinctly shows that the court, in passing upon the demurrers, considered them as going to the merits of the case, and by the ruling held that there was no cause of action stated in the petition and amendments. Now, as to the correctness of that ruling, we have nothing to say; for that judgment is final and conclusive, as between the parties thereto, until it is reversed, vacated, or set aside."

Such a judgment is *res judicata* even though leave to amend the petition be not granted by the court. *Carpenter* v. *Landry et al., supra.*

Snelson v. *Drane, supra,* presented facts almost identical with those involved in the case at bar. The judgment of

dismissal, which was there held to be *res judicata,* was rendered by the court upon sustaining a plea of abatement, a general demurrer and special exceptions. That judgment was affirmed by the Court of Civil Appeals, and a writ of error was dismissed for want of jurisdiction by the Supreme Court. The court held the judgment to be final and conclusive on the merits.

It should, moreover, be noted that the *Flato* case was a suit in equity. The judgment rendered in that cause was not a dismissal "without prejudice", or words to that effect, but by reason of the court's refusal to permit plaintiff to further amend his petition, was a judgment rendered deliberately with prejudice. It has many times been held that the dismissal of an equity suit, without stating that it is dismissed "without prejudice", or words to that effect, is a dismissal on the merits.

Baker v. *Cummings,* 181 U. S. 117, 124;
Swan Land and Cattle Co. v. *Frank,* 148 U. S. 603;
Durant v. *Essex Company,* 7 Wall. 107;
Wilson v. *Smith,* 126 Fed. 916, 919;
Worrell v. *Whitney et al.,* 185 Fed. 1002.

It is the policy of law of the State of Texas to dispose of all issues that can arise in any case in one proceeding. In *Nueces County et al.* v. *Gussett et al.,* 213 S. W. 725, it was said:

> "Under the Texas system of prosecuting and defending suits, which is largely based on common sense and reason, one great desire is to avoid a multiplicity of suits, and to dispose, at one stroke, of every issue that can arise out of the subject."

See also,

Skipworth v. *Hurt,* 94 Tex. 322, 60 S. W. 423;
Hume v. *Perry,* 136 S. W. 594;

Shell Petroleum Corporation et al. v. *Railroad Commission of Texas et al.*, 86 S. W. (2d) 57;
Warren v. *Houston Oil Co. of Texas et al.*, 6 S. W. (2d) 341.

We respectfully submit, therefore, that the judgment, rendered in the *Flato* case, was a final decision on the merits, because (a) it was a judgment of dismissal rendered in a suit in equity, which was not qualified by stating that the suit was dismissed "without prejudice" or words to that effect; (b) because under the decisions of the courts of the State of Texas a judgment rendered upon general demurrer is a judgment upon the merits, notwithstanding the fact that the court may have also sustained special exceptions to the complaint; and (c) because the judgment shows on its face that the court rendered a decision upon the general demurrer, separately from its decision sustaining the special exceptions, and under such circumstances each ruling is of equal validity and neither is *obiter*.

We also call the court's attention to the fact that among the special exceptions sustained by the judgment in the *Flato* case were a number which went to the merits. Nos. XXI to XXIV, inclusive (R. 908-911), were to the effect that the general laws of the State were applicable to the City of Corpus Christi; Nos. XL to XLII, inclusive (R. 924, 925), were to the effect that the law did not require the issuance of the bonds to be submitted to a vote of the taxpayers; Nos. 4a (R. 929) and 10a (R. 932) were to the effect that the bonds were valid, and Nos. XIV (R. 905) and 5a (R. 930) were to the effect that the city was estopped by virtue of ratification and the receipt of benefits. These special exceptions were in the nature of special demurrers going to the merits of the plaintiff's case. Each of these special exceptions was sustained by the trial court, and the decision of that court upon these special issues is likewise

res judicata as to those issues. *Jackson* v. *Finlay,* 40 S. W. 427. These issues may not be re-litigated by the City of Corpus Christi in the case at bar. The ruling of the court in the *Flato* case, upon the special exceptions, bars the respondent in this case from asserting as a defense (a) that the laws of Texas required the bonds to be submitted to a vote of the taxpayers; (b) that the bonds are invalid; and (c) that the city is not estopped from contesting the validity of the bonds by virtue of the ratification thereof and the receipt of the benefits obtained through the issuance thereof.

The Circuit Court of Appeals in its opinion infers that there may be some doubt whether the city was a party to the *Flato* case. We have above pointed out that the city was made a formal party to that case, filed an answer in the cause, and joined in the appeal to the Court of Civil Appeals. It was, unquestionably, therefore, a party to the action, but had it not been made a formal party, its interest in the subject matter and the position taken by it, would have bound it by the judgment.

Hauke v. *Cooper,* 108 Fed. 922;

Cavers et al. v. *Sioux Oil & Refining Co., et al.,* 39 S. W. (2d) 862; rehearing denied 43 S. W. (2d) 578;

Texas & N. O. R. Co. v. *Tilley,* 297 S. W. 1063, 6 S. W. (2d) 86;

Souffront v. *La Compagnie des Sucreries de Porto Rico,* 217 U. S. 475;

Hanrick et al. v. *Gurley et al.,* 93 Tex. 458, 56 S. W. 330;

In re Cherokee Public Service Co., 94 F. (2d) 536;

Ohio Fuel Gas Co. v. *City of Mt. Vernon,* 37 O. A. 159; 174 N. E. 260.

The decision in *City of Palestine* v. *City of Houston,* 262 S. W. 215, is most instructive upon this point. It appears from the opinion in that case that in a suit brought by the City of Palestine, Texas, against the International and

Great Northern Railway Co., the general offices, machine shops and round house of that company were permanently established and located at Palestine, and the Railroad Company was perpetually enjoined from changing or maintaining them at any place other than the City of Palestine. That judgment was pleaded as *res judicata* in a suit brought, on the relation of the City of Palestine, for the issuance of a writ of prohibition to restrain a proceeding in the District Court of Harris County, in a suit filed in that court by the City of Houston and certain citizens of Harris County, as plaintiffs, against the International and Great Northern Railroad Company, as defendants, seeking a judgment to establish the general offices of the Railroad Company at Houston. The City of Houston had not been made a formal party to the prior suit, but the court said:

> "The city of Houston, having knowledge of the former suit, employed and paid special attorneys of its own choosing to appear therein and assist in the defense and to co-operate with the special attorneys of the railway company in carrying on the litigation in the trial and on appeal, having claim and interest in the subject-matter, in mutual relationship to and identified with the claim and interest of the railway company to the same right. The city of Houston, though not a formal party to the record, through its special counsel in fact appeared therein in actual representation in the name of the railway company, actively participating in the defense of the suit, wherein the rights of the city of Houston were directly put in issue and were as directly determined. * * * The city of Houston and the attorneys representing it were interested beyond merely voluntarily assisting the railway company in the defense. The city was directly, and not merely indirectly, interested in the subject-matter involved, as claimed by the railway company. She was identified in interest with the railway company, which was a party, in having the general offices maintained in Houston and at no

other place. Interest, or the claim of interest, is the test, almost without exception, as to the right to be a party to a legal proceeding. In the circumstances, the city of Houston, and the public that it would legaliy represent, became bound by that judgment by so directly identifying itself through its attorneys, with the proceedings as to be a virtual party thereto. McMillan *v.* Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94, Ann. Cas. 1914B, 53; Cleveland *v.* Heidenheimer (Tex. Civ. App.) 44 S. W. 551; Lake *v.* Weaver, 80 N. J. Eq. 395, 86 Atl. 817."

In the *Flato* case, the City of Corpus Christi was identified in interest with the taxpayer who brought the suit. The City Attorney appeared in the case and endeavored to assist the taxpayer in securing a reversal of the judgment rendered by the trial court. Its interest in the subject matter of the suit was much more direct than was the interest of the City of Houston in the subject matter of the case above referred to. It was the obligor upon the very bonds, the cancellation of which the taxpayer sought in that suit, and the judgment which would be rendered in the action would most directly and vitally affect its interests. Under the decision of *Palestine* v. *Houston, supra,* the City of Corpus Christi, therefore, by its action in supporting the position of the taxpayer in the suit through its City Attorney, would have been bound by the judgment rendered by the court, even if it had not been made a party, and had not filed an answer in the cause.

The petitioners in the case at bar are in privity with the trustees under the indentures who were named parties defendant in the *Flato* case. Each of the indentures under which the trustees in that case were acting, and which had been given as security for the bonds, expressly provided that in all suits in any way affecting the indenture, the trustee should be deemed the representative of the bond-

holders and it should not be necessary to make any bondholder a party to such suit in order to bind him (R. 618, 661, 795). A judgment in the *Flato* case in favor of the taxpayer would have been binding upon the bondholders.

Elwell v. *Fosdick*, 134 U. S. 500, 512, 513;
Richter v. *Jerome*, 123 U. S. 233;
Louis v. *Brown Township*, 109 U. S. 162;
Laing v. *Queen City Ry. Co.*, 49 S. W. 136;
Cavers et al. v. *Sioux Oil & Refining Co., et al.*, 39 S. W. (2d) 862;
Houston Oil Co. v. *Village Mills Co.*, 241 S. W. 122;
Corcoran v. *Chesapeake and Ohio Canal Co.*, 94 U. S. 741;
Beals v. *Illinois, Missouri & Texas R. R. Co.*, 133 U. S. 290;
Kersh Lake Drainage Dist. v. *Johnson, United States Supreme Court*—decided March 25, 1940.

A decision in favor of the validity of the bonds, was, therefore binding upon all other parties to the action, and is *res judicata* in a suit between one of such parties and the bondholders involving the same issues.

It is quite immaterial that in the *Flato* case the court entered an order quashing citation by publication against unknown bondholders. The effect of that order was simply to declare that the unknown bondholders were not formal parties to the cause before the court, but it had no bearing upon the effect of the judgment upon them by reason of their being in privity with the trustees who remained parties to the cause. This precise point was decided by the Supreme Court of California in *Painter* v. *Painter*, 138 Cal. 231, 71 Pac. 90.

The fact that the City of Corpus Christi was a party defendant in the *Flato* case is immaterial. A judgment may be *res judicata* as between two or more co-defendants. The

facts involved in *Louis* v. *Brown Township, supra,* were almost identical with those involved in the case at bar. The township and a privy of the plaintiff in that case had been defendants in a prior suit, instituted by a taxpayer, in which a judgment was rendered holding bonds of the township to be invalid. That judgment was held *res judicata* in a later suit brought by the bondholders against the township. See also:

Chicago, Rock Island & Pacific Railway Co. v. *Schendel,* 270 U. S. 611;

Corcoran v. *Chesapeake and Ohio Canal Co.,* 94 U. S. 741;

Orcutt v. *McGinley et al.,* 96 Neb. 619; 148 N. W. 586;

City of El Reno, et al. v. *Cleveland-Trinidad Paving Co.,* 25 Okla. 648; 107 Pac. 163;

Harmon v. *Auditor of Public Accounts,* 123 Ill. 122; 13 N. E. 161;

Georgia Railroad & Banking Co. v. *Wright,* 124 Ga. 596; 53 S. E. 251;

Waldo v. *Waldo,* 52 Mich. 91; 17 N. W. 709;

Millikan v. *City of Lafayette,* 118 Ind. 323; 20 N. E. 847;

Giblin v. *North Wisconsin Lumber Co.,* 131 Wis. 261; 111 N. W. 499;

Morgan v. *Hart,* 84 Wash. 496; 147 Pac. 26;

Secor v. *Singleton,* 41 Fed. 725;

Cook, et al. v. *City of Des Moines,* 125 Iowa 611; 101 N. W. 434.

This is also the law of Texas.

Gordon v. *Thorp,* 53 S. W. 357;

Carnes v. *Carnes,* 26 Civ. App. Tex., 610; 64 S. W. 877.

Under the Texas practice, the court could have rendered a judgment for or against any of the defendants or any

of the plaintiffs. (Texas Rev. Statutes 1925, Art. 2211; Vernon's Texas Statutes, 1936, Art. 2211).

POINT II.

The decision in Corpus Christi v. Flato was not overruled by the decision in Radford et al. v. City of Cross Plains.

The Circuit Court of Appeals states in its opinion that the decision, rendered in the *Flato* case by the Texas Court of Civil Appeals, and which became the final judgment of that court by reason of the dismissal of the motion for a writ of error by the Supreme Court of Texas, was overruled by the later decision of the Supreme Court of Texas, in *Radford et al.* v. *City of Cross Plains,* 86 S. W. (2d) 204. We respectfully submit that the *Cross Plains* case did not overrule the decision in the *Flato* case because the facts in these cases differ, and for that reason a principle of the law of Texas, as announced by decisions of the Supreme Court of Texas, which was applicable to the *Flato* case was not, on the facts, applicable to the *Cross Plains* case.

Moreover, it is apparent from the Record in the case at bar that the Supreme Court of Texas felt that the two cases were distinguishable. When the Supreme Court dismissed the application for a writ of error in the *Flato* case, it was familiar with the *Cross Plains* case. One of the grounds assigned for the application to the Supreme Court of Texas for a writ of error in the *Flato* case was that the Court of Civil Appeals had rendered a decision, which conflicted with the decision in the *Cross Plains* case, rendered by another Court of Civil Appeals (R. 1001, 1003, 1019). When the application for a writ of error was made to the Supreme Court of Texas the *Cross Plains* case was pending in that court (R. 1001). It is apparent, therefore, that the Supreme Court of Texas had these two cases under consideration at the same time. It dismissed the application for a writ

of error in the *Flato* case, October 2, 1935 (R. 476). The report of the *Cross Plains* case, 86 S. W. (2d) 204, shows that it filed its opinion in that case, October 9, 1935. Thereafter, a motion for a rehearing in the *Flato* case was filed in the Supreme Court of Texas admitting that the Court of Civil Appeals had held the bonds valid obligations, but contending this was error in substantive law (R. 1033-1035). Rehearing was denied by the court. It is apparent, therefore, that the Supreme Court of Texas must have felt that the decision in the *Cross Plains* case was distinguishable from its decision in the *Flato* case. Any other interpretation would mean that the Supreme Court of Texas had deliberately rendered two conflicting decisions and had refused to correct its error after it had been brought to its attention. We respectfully submit that no court is justified in indulging in such a presumption. On the contrary it must be assumed that the Supreme Court of Texas regarded the two cases as distinguishable.

There are at least two grounds upon which the two cases can be distinguished. The Circuit Court of Appeals states in its opinion that the bonds involved in the *Cross Plains* case were issued for the same purposes as were the bonds involved in the case at bar. That, however, is not so. In the *Cross Plains* case a water system was incumbered for the purposes of that system ***and to build a sewer system.*** The Supreme Court of Texas had previously held in *City of Dayton* v. *Allred*, 123 Texas, 60, 68 S. W. (2d) 172, that the statutes of Texas did not permit the incumbering of one public utility for the purpose of constructing a different utility, without a vote of the qualified voters of the city. The bonds involved in the *Flato* case were issued for the purpose of acquiring additional water powers for the water system which was encumbered. No attempt was made to encumber the water system to construct a different public utility, as was attempted in the *Cross Plains* and *Dayton*

cases. There is no decision of the Supreme Court of Texas holding that bonds, solely for the purpose of acquiring additional water powers, payable out of the revenues of the municipal water system, must be voted by the qualified voters of the city.

Another ground of distinction is, the City of Cross Plains offered restitution to the bondholders, as appears from the opinion of the Supreme Court of Texas in the *Cross Plains* case. No offer of restitution had been made, or has yet been made by the City of Corpus Christi, and one of the very points decided by the trial court in the *Flato* case was that the City of Corpus Christi was estopped to contest the validity of the bonds because it had received and was retaining the benefits derived from their issuance. We will proceed to point out that under the decisions of the Supreme Court of Texas, which we respectfully submit are binding upon the Federal courts, an estoppel does arise under such circumstances, and the Circuit Court of Appeals erred in ignoring these rulings.

Point III.

The City of Corpus Christi is estopped to deny the validity of the bonds by virtue of accepting and retaining the benefits derived by it from the issuance of the bonds.

Under the decisions of this Court, the Federal courts are obliged to follow and apply the law of the State as construed by the State courts. We respectfully submit that the Circuit Court of Appeals has completely ignored the decisions of the courts of Texas in reversing the decision of the United States District Court. The United States District Court held that the City was estopped to contest the validity of the bonds, because it had received and was retaining the benefits derived from their issuance. As heretofore pointed out, the trial court in the *Flato* case

sustained a special exception to the same effect. These rulings conform to the decisions of the Supreme Court of Texas.

In *Hill County* v. *Bryant & Huffman, et al.*, 118 Tex. 359; 16 S. W. (2d) 513, the Supreme Court of Texas held that a corporation, whether public or private, could not avoid liability under void but executed contracts, where such contracts are not *malum in se,* or *malum prohibitum,* or against public policy, where the benefits under them had been received. In that case the court said:

> "In cases where corporations, municipal or otherwise, partnerships or persons, attempt to avoid their liabilities under void but executed contracts, where such contracts are not *malum in se* or *malum prohibitum,* or against public policy, and where the benefits under them have been received, the law interposes an estoppel, and declines to permit the validity of such contracts to be called in question."

Likewise, in the case of *Payne* v. *First Nat. Bank of Columbus, Ohio,* 291 S. W. 209, the Supreme Court of Texas held that a city was estopped upon non-negotiable warrants issued in violation of the Constitution of the State, because of receipt and retention of benefits. In the opinion of the Commission of Appeals which was adopted by the Supreme Court of Texas, it was said:

> "we are thoroughly convinced that a municipal corporation, under the facts of this case, should be held to rules of estoppel, the same as the individual citizen would be under the same circumstances."

See also, *City of Corpus Christi* v. *Central Wharf and Warehouse Co.,* 8 Tex. Civ. App. 97; 27 S. W. 803, which was cited by the Supreme Court of Texas, in the Hill County case, as an authority to the same effect.

In *Sluder* v. *City of San Antonio,* 2 S. W. (2d) 841, the Commission of Appeals, after holding that a contract for services was invalid, nevertheless held the city liable. In its opinion the court said:

> "The latest expression of our Supreme Court on this question is its approval of the judgment of the Commission of Appeals in the case of Payne et al. *v* Bank, 291 S. W. 210. In that case it was decided that the action of the city of North Pleasanton in attempting to create a debt and pledge the credit of the city as payment *was void under the Constitution and statute,* yet the city was liable to pay its warrants; it appearing that the city had received the benefit of the money that had been acquired and spent for said improvements. The decision is predicated upon the proposition that, while the contract was absolutely void, upon the doctrine of acquiesence, ratification, and estoppel the city could not resist the right of the holders of the warrants to recover thereon when it appeared the city had received the benefit of the proceeds thereof." (Italics ours.)

It will be noted, moreover, that in *Hill County* v. *Bryant & Huffman, supra,* and in *Payne* v. *First Nat. Bank of Columbus, Ohio, supra,* the suit was brought upon the contract and not upon *quantum meruit.* These decisions, therefore, are decisions of the Supreme Court of Texas, to the effect that the law of Texas does not permit a municipal corporation to contest the validity of an executed contract, which is not *malum in se, malum prohibitum,* or contrary to the public policy, when it has received and retains the benefits under the contract. We submit they were binding upon the Circuit Court of Appeals. It made no effort to distinguish them in its opinion, but merely ignored them.

In passing, it might be pointed out that the decision in *City of Hamlin, Tex., et al.* v. *Brown-Crummer Inv. Co.,* 93 F. (2d) 680, which is cited by the Circuit Court of

Appeals in its opinion, is not inconsistent with the views herein expressed. It appears from the opinion in that case that the city of Hamlin tendered restitution to the bondholders. No question of estoppel arising out of receipt and retention of benefits was involved in the Hamlin case.

Point IV.

The bonds were legally issued and the city may not dispute their validity.

The Circuit Court of Appeals decided the bonds were void in the hands of petitioners because their issuance had not been approved by a vote of the qualified electors of the city. Petitioners admit no vote of the qualified electors was had upon the issuance of the bonds, but contend that the statute authorizing their issuance did not require such a vote. The Circuit Court of Appeals has interpreted the decision in *City of Cross Plains* v. *Radford, supra,* as requiring it to hold the bonds void for lack of a vote, notwithstanding the decision in *City of Corpus Christi* v. *Flato, supra,* to the contrary. Petitioners contend the State courts of Texas have never held that bonds, such as those involved in the case at bar, must be voted by the qualified electors. It should be noted that in the *Cross Plains* case it appeared a water system had been encumbered for improvements to an existing sewer system as well as the water system. In keeping with its earlier decision in *Dayton* v. *Allred, supra,* the Texas court held that such bonds could not be issued without an approving vote of the qualified electors because they did not constitute purchase money bonds for additional water powers within the meaning of Article 1112, Revised Civil Statutes, Texas, 1925, exempting such bonds from the requirement of a vote. It was not even contended in the *Cross Plains* case that the bonds were issued for purchase money for additional water powers. The bonds in the case

at bar were issued solely for the purpose of acquiring additional water powers for the benefit of the water system alone and, therefore, it cannot be said they are similar to the bonds before the court in the *Cross Plains* case.

Article 1111, Revised Civil Statutes, Texas 1925, authorized the city to encumber its water system "acquired or to be acquired" and the franchise and income thereof and everything pertaining thereto "to purchase same, or to purchase additional water powers, riparian rights", etc. It cannot be questioned that the city was expressly authorized by this statute to encumber its existing water system for the purpose of purchasing additional water powers and riparian rights. The reference to a system "acquired" as distinguished from one "to be acquired" and the reference to the purchase of "additional" water powers and riparian rights seems to make this clear. Article 1112 prohibited the encumbering of such a system without a vote of the qualified electors "except for purchase money". Obviously when Article 1112 speaks of "purchase money" it means money for the purchases authorized by the same statute and referred to in Article 1111, which with respect to water systems includes the purchase of additional water powers. This was the purpose for which the bonds in the case at bar were issued and they so recite.

It should also be noted that in addition to reciting the purpose of issue, the bonds further recite the performance of all conditions precedent to their issuance. It has been repeatedly held by this Court that such a recital will estop a municipality from asserting the bonds are invalid because no election was held upon their issuance, or because an election was not properly conducted (*Town of Venice* v. *Murdock*, 92 U. S. 494; *Board of Commissioners of the County of Knox* v. *Aspinwall*, 21 How. 539; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners of Douglas County* v. *Bowles*, 94 U. S. 104; *Oregon* v. *Jennings*, 119 U. S. 74;

Johnson County v. *January*, 94 U. S. 202; *Bissell* v. *City of Jeffersonville*, 24 How. 287; *Evansville* v. *Dennett*, 161 U. S. 434).

Not only did the city receive the benefits of the bond issue which it now enjoys, but it has by its continued action recognized the bonds as being its valid obligations. Most of the bonds have been outstanding since 1927, and from that time through the year 1932 the city recognized its obligation on the bonds by paying interest thereon. It recognized the bonds as its obligation throughout the negotiations with the bondholders leading up to the making of the Reconstruction Finance Corporation loan, and encouraged the holders of the bonds to forego valuable rights by agreeing to modifications in the terms of the bonds. Having obtained all these benefits the city now repudiates the very instruments through which it received such benefits. Such conduct creates an estoppel against the city. (*Supervisors* v. *Shenck*, 5 Wall. 772; *County of Clay* v. *Society for Savings*, 104 U. S. 579; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227; *Sluder* v. *City of San Antonio*, 2 S. W. (2d) 841; *Hill County* v. *Bryant & Huffman*, 16 S. W. (2d) 513; *Grimes County* v. *W. L. Slayton & Co.*, 262 S. W. 209.)

E.

Conclusion.

Petitioners submit there has been such a miscarriage of justice that the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed, and that for the reasons set forth in the petition this is a case that calls for the exercise of this Court's power of review.

APPENDIX 1.

Articles 1111 to 1118, Revised Civil Statutes of Texas 1925, as Amended by Chapter 194, Laws 1927.

Article 1111. All cities and towns operating under this title have power to mortgage and encumber their light systems, water systems, or sewer systems, either, both, or all, and the franchise and income thereof, and everything pertaining thereto, acquired or to be acquired, to secure the payment of funds to purchase same, or to purchase additional water powers, riparian rights, or to build, improve, enlarge, extend or repair such systems, or either, or all of them, and as additional security therefor, by the terms of such encumbrance, may grant to the purchaser under sale or foreclosure thereunder, a franchise to operate the systems and properties so purchased for a term of not over twenty years after such purchase, subject to all laws regulating same then in force. No such obligation shall ever be a debt of such city or town, but solely a charge upon the properties so encumbered and shall never be reckoned in determining the power of such city or town to issue any bonds for any purpose authorized by law. (As amended by Chapter 194, Laws 1927.)

Article 1112. No such light, water, or sewer system shall ever be sold until such sale is authorized by a majority vote of the qualified voters of such city or town; nor shall same be encumbered for more than five thousand dollars, except for purchase money, or for extensions, or to refund any existing indebtedness, until authorized in like manner. Such vote in either case shall be ascertained at an election, of which notice shall be given in like manner as in cases of the issuance of municipal bonds by such cities and towns. (As amended by Chapter 194, Laws 1927.)

Article 1113. Whenever the income of any lighting, water, or sewer systems shall be encumbered under this law, the expense of operation and maintenance, including all salaries, labor, materials, interest, repairs and extensions, necessary to render efficient service, and every proper item of expense shall always be a first lien and charge against

such incomes. The rate charged for services furnished by any said system shall be equal and uniform, and no free service shall be allowed except for city public schools, or buildings and institutions operated by such city or town. There shall be charged and collected for such services a sufficient rate to pay for all operating, maintenance, depreciation, replacement, betterment and interest charges, and for interest and sinking fund sufficient to pay any bonds issued to purchase, construct or improve any such systems or of any outstanding indebtedness against same. No part of the income of any such system shall ever be used to pay any other debt, expense or obligation of such city or town, until the indebtedness so secured shall have been finally paid. (As amended by Chapter 194, Laws 1927.)

Article 1114. Every contract, bond or note issued or executed under this law shall contain this clause: "The holder hereof shall never have the right to demand payment of this obligation out of any funds raised or to be raised by taxation."

Article 1115. The management and control of any such system or systems during the time they are encumbered, may by the terms of such encumbrance, be placed in the hands of the city council of such town, or may be placed in the hands of a board of trustees to be named in such encumbrance, consisting of not more than five members, one of whom shall be the mayor of such city or town. The compensation of such trustees shall be fixed by such contract, but shall never exceed five per cent of the gross receipts of such systems in any one year. The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance. In all matters where such contract is silent, the laws and rules governing the council of such city or town shall govern said board of trustees so far as applicable.

Article 1116. The city council or board of trustees having such management and control shall have the power to make rules and regulations governing the furnishing of service

to patrons and for the payment of the same, and providing for the discontinuance of such service failing to pay therefor when due until payment is made. The city council shall have power to provide penalties for the violation of such rules and regulations and for the use of such service without the consent or knowledge of the authorities in charge thereof, and to provide penalties for all interference, trespassing or injury to any such systems, appliances or premises on which same may be located.

Article 1117. A contract of encumbrance may provide for the selection of a trustee to make sale upon default in the payment of the principal or interest according to the terms of such contract, and for the selection of his successor if disqualified or failing to act, and for collection of fees not exceeding five per cent of the principal.

Article 1118. No collection fees shall accrue, and no foreclosure proceedings shall be begun in any court or through any trustee, and no option to mature any part of such obligation because of default in payment of any installment of principal or interest shall be exercised until ninety days written notice shall be given to each member of the city council of such city or town and to each member of such board of trustees, if any, that payment has been demanded and default made, which notice shall date from the sending of a prepaid registered letter to each person to be notified, addressed to them at the post office in such city or town. If the installments of principal and interest then due shall be paid before the expiration of said ninety days, together with the interest prescribed in such contract, not exceeding ten per cent per annum, from the date of default until the date of payment, it shall have like effect as if paid on the date the same was originally due.

APPENDIX 2.

CITY OF CORPUS CHRISTI EX REL. HARRIS,

v.

FLATO ET AL.

No. 9533.

COURT OF CIVIL APPEALS OF TEXAS.

San Antonio.

March 20, 1935.

Rehearing Denied May 29, 1935.

1. Municipal corporations. Key 1000(5).

Taxpayer cannot maintain action for damages on behalf of municipal corporation against third party without alleging facts to show that taxpayer has made refused demand on proper officers to bring action, or to show that demand would have been unavailing.

2. Municipal corporations. Key 1000(5).

Petition by taxpayer to recover on behalf of city from waterworks improvements contractor damages for breach of contract and to recover from various defendants moneys previously paid by city, as interest or otherwise, on waterworks revenue bonds, *held* demurrable for failure to allege facts showing that taxpayer made refused demand upon city officers to sue defendants or facts showing that demand would have been fruitless.

3. Municipal corporations. Key 999.

Provision of charter of city of Corpus Christi authorizing taxpayer to maintain actions to restrain execution of illegal contract on behalf of city and to restrain disbursing officers from paying illegal claims against city *held* not to

authorize taxpayer to maintain action for city against third party.

4. Cancellation of instruments. Key 37(1).
Injunction. Key 118(1).
Quieting title. Key 34(1).

Petition for equitable relief of cancellation, rescission, removal of cloud from title, and injunction states no cause of action, where petition shows complainant guilty of laches.

5. Municipal corporations. Key 1000(1).

Citizen *held* charged by law with knowledge of transactions in connection with waterworks improvements and issuance of waterworks revenue bonds.

6. Municipal corporations. Key 1000(5).

Taxpayer's petition to cancel municipal waterworks revenue bonds issued for construction of waterworks improvements and to restrain payment thereof *held* generally demurrable as showing that taxpayer was guilty of laches, where petition showed that bonds were issued, and transactions relating to their issuance took place, within five years preceding filing of petition, during which period rights of others intervened, although petition alleged that taxpayer could not and did not learn facts until after bonds had been delivered, since taxpayer was charged with knowledge of facts by law.

7. Municipal corporations. Key 918(1).

Issuance of waterworks revenue bonds by city of over 5,000 population for construction of additions to city's waterworks system need not be submitted to and approved by majority of taxpaying citizens, although city charter may so provide (Rev. St. 1925, arts. 1111, 1112, as amended by Acts 1927, c. 194; Const. art. 11, Sec. 5, adopted in 1912).

8. Municipal corporations. Key 79.

Bonds of home rule city issued to pay for improvements added to existing waterworks system *held* valid, notwith-

standing failure to comply with provision of city charter requiring approval by vote of taxpaying citizens, in view of statute providing that no vote of citizens is necessary to encumber water system for purchase money, or for extensions, or to refund existing indebtedness, since statute controls charter (Rev. St. 1925, arts. 1111, 1112, as amended by Acts 1927, c. 194; Const. art. 11, Sec. 5, adopted in 1912).

Appeal from District Court, Nueces County; Birge Holt, Judge.

Suit by the City of Corpus Christi, on the relation of W. F. Harris, against Edwin Flato and others. From a judgment dismissing the cause on general demurrer to the petition, relator appeals.

Affirmed.

E. B. Ward and C. D. Johns, both of Corpus Christi, and Moursund, Moursund & Bergstrom, of San Antonio, for appellant.

Fulbright, Crooker & Freeman and Charles A. Leddy, all of Houston, Kleberg & Eckhardt, of Corpus Christi, and W. P. Dumas, of Dallas, for appellees.

BICKETT, Chief Justice.

This suit was instituted on September 24, 1932, in the name of W. F. Harris and of the city of Corpus Christi upon the relation of W. F. Harris, as plaintiffs, against Edwin Flato and others, officers of the city of Corpus Christi, the Republic National Bank & Trust Company of Dallas, First National Bank in Dallas, Guardian Trust Company of Houston, Smith Bros., Inc., the "unknown owners and holders" of certain bonds and the city of Corpus Christi. The objects of the suit were: (1) To cancel, $2,725,000 of waterworks revenue bonds, as well as the deeds of trust securing payment thereof, which were issued by the city for the construction of additions and improvements to a waterworks system, to recover all money paid as interest on the bonds, and to restrain the payment of further sums upon the bonds; (2) to recover damages on behalf of the city for alleged breach of contract by

Smith Bros., Inc. with reference to the construction of a dam and reservoir and the purchase of easements on lands. The district court sustained a general demurrer and numerous special exceptions of the defendants to the petition, and dismissed the cause. This appeal by Harris, individually and as relator, presents for review the trial court's action in sustaining the general demurrer to the petition.

The fourth amended original petition alleged, in substance, as follows: That Harris was a resident citizen and property taxpayer of the city of Corpus Christi and a patron of its waterworks system; that the city was incorporated under a charter which was granted by special act of the Legislature in 1909 (Loc. & Sp. Laws, c. 33), and which has been amended from time to time by vote of the people pursuant to article 11, Sec. 5, of the Constitution of Texas; that the city owned its waterworks system prior to 1909 and at all subsequent times; that the charter required the question as to construction of improvements and issuance of bonds, such as are involved in this suit, to be submitted to a vote of the qualified taxpaying voters; that the city commission entered into a contract with Smith Bros., Inc., on July 21, 1927, for the construction of a dam and storage reservoir on the Nueces river, a filtered water reservoir, a pumping station, and a steel water tower, and for the advancement of funds for the purchase of lands for the reservoir above the dam; that on July 21, 1927, the city executed and delivered to Republic Bank & Trust Company of Dallas, trustee, bonds of the city in the amount of $2,000,000 and a deed of trust, providing for payment of the bonds only out of the revenues of the waterworks system, creating a lien upon the entire waterworks plant, including the contemplated improvements, and the income thereof to secure the payment of the bonds, and reciting the representation of the bondholders by the trustee with respect to the assertion of any right of action or the defense of a suit without the necessity of notice to, or joinder of, any bondholder; that, on August 1, 1928, the city executed and delivered to City National Bank of Dallas, trustee, bonds of the city in the amount of $350,000 and a deed of trust, all of like tenor and effect as the original bonds

and original deed of trust, except as to amounts, maturities, and name of trustee; that on September 1, 1929, the city executed and delivered to Republic National Bank & Trust Company of Dallas, trustee, bonds of the city in the amount of $375,000 and a deed of trust, all of like tenor and effect as the original bonds and original deed of trust, except as to amounts, maturities, and name of trustee; that, on November 1, 1929, the city executed and delivered to Guardian Trust Company of Houston, trustee, refunding bonds of the city in the amount of $725,000 and a deed of trust, all of like tenor and effect as the original bonds and original deed of trust, except as to amounts, maturities, and name of trustee, for the purpose of refunding the issues of $300,000 and $375,000 respectively; that on March 1, 1933, the city and each of the trustees, respectively, executed supplemental indentures, the provisions of which were not alleged in the petition, but which are shown by the briefs and the remarks of counsel on oral argument to have been agreements for the subordination of the liens to a new lien in favor of Reconstruction Finance Corporation to secure payment of $450,000 or $500,000 borrowed for the reconstruction and repair of the dam partially destroyed by flood; that each of the series of bonds, deeds of trust, and supplemental indentures was executed and delivered without being submitted to a vote of the qualified taxpaying voters of the city; and none of them was executed for payment of purchase money or for extensions or for refunding any existing valid indebtedness of the waterworks system; that the bonds were nonnegotiable, and the holders of them are not innocent purchasers thereof; that Smith Bros., Inc., entered into the construction contract with the city with the intention not to complete it in accordance with the plans and specifications, and did, in fact, fail to comply with the contract with respect to clearing the area above the dam of trees and brush, compressing embankments with rollers, driving piling to sufficient depth, and preventing seepage beneath the dam, and doing, or failing to do, other things unknown to plaintiff; that Smith Bros., Inc., falsely represented to the city that it had properly constructed the improvements, and thereby obtained the acceptance of

the work and the delivery of the bonds; that in the latter part of 1930 the dam, under conditions that it should have withstood if properly constructed, washed away and was practically destroyed and became worthless to the city; that "those acting for said city in the purchase of the above mentioned lands" (without identifying such agents), although obligated to obtain fee simple title or unencumbered easements, purchased easements with limitations and conditions attached thereto, as paying taxes and building and maintaining roads and bridges; that Smith Bros., Inc., with knowledge that the easements were not such as required, advanced the money for purchase thereof; that the city commission wrongfully accepted the easements and the improvements; that the plaintiff, Harris, had no occasion to learn the facts and could not have known them and did not know them until after the bonds had been delivered and the dam had been washed away; that the bonds were fraudulently procured and are void, as are, also, the purported liens; that the plaintiff is entitled to a decree restraining the payment of the bonds; that the city has illegally made payments (interest) upon the bonds, for the repayment of all of which the defendants are liable; that the defendants are liable for all damages caused by the acts complained of; that the city authorities are continuing wrongfully to levy and collect water charges for the purpose of paying the bonds, and will in the future continue so to do; that "they have failed and refused to take any action to restrain the collection of said bonds or to have the same adjudicated, and they have and still insist upon carrying out the said alleged illegal contracts, and, therefore, as it is necessary for him to do, this plaintiff, for himself and as a taxpayer of the said city and as relator on behalf of the said City of Corpus Christi sues herein for his own protection and as a taxpayer, and for the relief that the said City of Corpus Christi is justly entitled to"; that the plaintiff and the city, if not entitled to the injunction sought, are entitled to recover judgment against the defendants and each of them for the damages suffered by reason of the execution of the instruments and the payments past and future on account of the bonds.

Article 11, Sec. 5, of the Constitution of Texas, known as the "home rule amendment," reads in part as follows: "Cities having more than five thousand (5,000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."

Articles 1111 and 1112, Revised Civil Statutes of Texas 1925), as amended by Acts of 1927, Regular Session, c. 194, p. 276, are:

"Article 1111. All cities and towns operating under this title have power to mortgage and encumber their light systems, water systems, or sewer systems, either, both, or all, and the franchise and income thereof, and everything pertaining thereto, acquired or to be acquired, to secure the payment of funds to purchase same, or to purchase additional water powers, riparian rights, or to build, improve, enlarge, extend or repair such systems, or either, or all of them, and as additional security therefor, by the terms of such encumbrance, may grant to the purchaser under sale or foreclosure thereunder, a franchise to operate the systems and properties so purchased for a term of not over twenty years after such purchase, subject to all laws regulating same then in force. No such obligation shall ever be a debt of such city or town, but solely a charge upon the properties so encumbered and shall never be reckoned in determining the power of such city or town to issue any bonds for any purpose authorized by law."

"Article 1112. No such light, water, or sewer system shall ever be sold until such sale is authorized by a majority vote of the qualified voters of such city or town; nor shall same be encumbered for more than five thousand dollars, except for purchase money, or for extensions, or to refund any existing indebtedness, until authorized in like manner. Such vote in either case shall be ascertained at an election, of which notice shall be given in like manner as in cases of the issuance of municipal bonds by such cities and towns."

The charter of the city of Corpus Christi contains the following provisions:

Article 2, Sec. 2."It shall have all powers of municipal government not prohibited to it by this charter, or by some general law of the State of Texas. * * * No ordinance shall be enacted inconsistent with the laws of the State of Texas."

Article 12, Sec. 1. "Any citizen who is a property tax payer of the City of Corpus Christi may maintain an action in the proper court to restrain the execution of any illegal, unauthorized or fraudulent contract or agreement on behalf of the said city, and to restrain any disbursing officer of said city from paying any illegal, unauthorized or fraudulent bills, claims or demands against said city. * * * "

Article 12, Sec. 14. "It shall be the duty of the city council, by ordinance to set apart and appropriate all the revenues and moneys derived from the operation of said works to the support, maintenance and extension thereof to other parts of the City, and no part of such revenue shall ever be appropriated to or used for any other purpose * * *"

Article 12, Sec. 15. "The City Council upon a vote of four-fifths thereof, shall have power, by ordinance, to contract for the extension of said water works to other parts of the City where neded, and, to this end may pledge the net annual revenues thereof and may give a lien on the said entire plant, including such improvements or extensions, to secure the contract price of same, and may execute promissory notes therefor, signed by the Mayor and countersigned by the City Controller, and bearing interest at not exceeding six per cent per annum, and payable in equal annual installments; provided, such obligations shall never become a charge against the City or against the other revenues of the City, but said water works plant and said net annual revenues thereof shall stand pledged to secure the payment of said notes, and provided further that the cost of such improvements or extensions shall never exceed one-third of the actual value, of said water works plant including such proposed improvements or extensions, and provided fur-

ther that no extensions or improvements exceeding in cost the probable net revenues for any one year, shall ever be contracted for without first having been submitted to the vote of the qualified tax paying voters at an election held exclusively for that purpose."

[1, 2] It is a necessary prerequisite to the maintenance of an action for damages by a taxpayer on behalf of a municipal corporation against a third party for the taxpayer to allege the facts to show that he has made a demand upon the proper officers to bring such an action and that they have refused to do so or to show that such a demand by him would have been unavailing. It would result in endless confusion of municipal affairs if the individual citizen, who might be inspired by motives good or bad, could institute actions for damages for breach of municipal contracts without first presenting the question of the propriety of such procedure to the public officers, who are given discretion and charged with responsibility. The right of action, if any, is that of the city, not that of the citizen. He has involved no interest different from that of all of the other members of the general public. His initiative must be subordinated to that of the public by and through its duly selected officers. This petition is devoid of any allegation that Harris made demand upon the officers of the city to sue any of the defendants for damages on account of the matters mentioned in the petition, or that the officers refused to bring such an action after demand, or that such demand would have been fruitless. The demurrer was therefore correctly sustained in so far as the supposed cause of action for damages for breach of contract is concerned. 5 McQuillan, Municipal Corporations, Secs. 5333, 5369; City of Corpus Christi *v.* Mireur (Tex. Civ. App.) 214 S. W. 528, 531; City of San Antonio *v.* Strumberg, 70 Tex. 366, 7 S. W. 754, 755; Fisher *v.* City of Bartlett (Tex. Civ. App.), 76 S. W. (2d) 535; Anders *v.* City of Philadelphia, 235 Pa. 125, 83 A. 939; Fuller *v.* Trustees of Deerfield Academy, 252 Mass. 258, 147 N. E. 878; Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586; Dunn *v.* Long Beach Land & Water Co., 114 Cal. 605, 46 P. 607; Connelly *v.* City of Elmira, 144 Misc. 282, 258 N. Y. S. 603.

In City of San Antonio *v.* Strumberg, supra, the Supreme Court of Texas, speaking through Judge Gaines, said: "We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law, that no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself. As applied to public measures the doctrine is elementary. (2 Cooley's Blackstone, 219.) For a special damage resulting from the invasion of a right enjoyed by a party in common with the public, the law affords him a remedy by private action, but if the damages be only such as are common to all, the action must be brought by the lawfully constituted guardian or guardians of the public interest. The principle has been frequently applied in this court to another class of cases, and the right of an individual to sue without showing some special damage, either suffered or threatened has been uniformly denied."

The same rule applies to the petition in so far as it may be construed as asserting a cause of action to recover from some or all of the defendants moneys previously paid by the city by way of interest or otherwise upon the bonds. Fuller *v.* Trustees of Deerfield Academy, supra; Wood *v.* Bangs, supra.

[3] Nor does article 12, Sec. 1 of the city charter, above quoted, change the general rule as to the purported causes of action for damages for breach of contract or for recovery of money paid. The language relates only to interference by the citizen with the making of illegal or unauthorized contracts by the officers of the city. It does not authorize the citizen to sue for the city. The distinction between a suit against the officers and one for the city is clear upon the face of the charter provision. Thus, in City of Corpus Christi *v.* Mireur, supra, this court, through Chief Justice Fly, said: "Appellants seek to construe section 1, art. 12, of the charter, which provides that 'any citizen who is a property taxpayer of the city of Corpus Christi may maintain an action in the proper court to restrain the execution of any illegal, unauthorized or fraudulent contract or agreement on behalf of said city,' as meaning that the taxpayer

may act for the city in prosecuting a suit to restrain the execution of an illegal contract. Such construction is unwarranted. There would be no reason for placing any such power in the hands of the taxpayer, and the other matters which the taxpayer is given the right to have restrained clearly show that the suit is not in behalf of the city, but to prevent the city council, in behalf of the city, from making 'any illegal, unauthorized, or fraudulent contract or agreement.' Immediately in connection with the authority given to restrain the city from making illegal contracts is given the right to restrain any disbursing officer from paying illegal bills, etc., clearly indicating that the whole object of the section is to give authority to prevent illegal action on the part of the city or its officers, and not to assist them in avoiding some contract, into which they may have been inveigled."

[4-6] A petition which seeks the equitable relief of cancellation, rescession, removal of cloud from title, and injunction, and which shows upon its face that the complainant has been guilty of laches, fails to state a cause of action, and is therefore subject to general demurrer. This petition deals with the construction of the water supply plant for the city, and shows the issuance of bonds therefor in amounts upon dates, respectively, as follows: $2,000,000 on July 21, 1927, $350,000 on August 1, 1928, and $375,000 on September 1, 1929. It, also, shows that there was a refunding issue on March 1, 1933, covering the two last issues. Presumably, the required newspaper notices were given and other precedent steps taken. These transactions were public acts of the city commission. Lands or easements were conveyed to the city. The bonds passed into the hands of the various persons referred to in the petition as "unknown owners and holders." The interest was paid on the bonds from time to time; and the sinking fund installments were periodically set aside. The citizen is charged by law with knowledge of these things. The allegation seeking to excuse delay, that Harris had no occasion to learn the facts and could not have known them and did not know them until after the bonds had been delivered and the dam had washed away, is of no consequence. He must have known the facts;

in legal contemplation he did know them. And yet it was not until September 24, 1932, that he filed the original petition in this case. The showing of such unreasonable delay, during which time the rights of others have intervened, constitutes laches and presents a fatal defect in the petition. Penn Mutual Life Insurance Co. *v.* City of Austin, 168 U. S. 685, 18 S. Ct. 223, 42 L. Ed. 626; Los Angeles Heights Ind. School District *v.* Chestnut (Tex. Civ. App.) 287 S. W. 693; Fannin-Lamar-Delta Imp. Dist. No. 3 *v.* State (Tex. Civ. App.) 73 S. W. (2d) 1101; McCauley *v.* North Texas Traction Co. (Tex. Civ. App.) 21 S. W. (2d) 309; Campbell *v.* Houchin (Tex. Civ. App.) 35 S. W. 753; Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. Ed. 718; Tidd *v.* Kirkham, 124 Neb. 605, 247 N. W. 594; Conners *v.* City of Lowell, 246 Mass. 279, 140 N. E. 742.

[7, 8] The issuance of waterworks revenue bonds by a city of over 5,000 population for the construction of a reservoir and other additions to the waterworks system of the city is not required to be submitted to, and approved by, a majority of the taxpaying citizens of the city, although the charter of the city may so provide. The city of Corpus Christi, having sufficient population, is subject to the so-called "home rule amendment" (article 11, Sec. 5, of the Constitution of Texas, adopted in 1912). The city's charter, granted by legislative act in 1909, required in terms that the issuance of such bonds should first be submitted to, and approved by a vote of, the taxpaying citizens of the city. The petition shows that these bonds were issued for the purpose of paying for the purchase of lands and the construction of a dam, a reservoir, a filtered water reservoir, a steel tower, and a pumping station, all of which were additions to an existing waterworks system of the city. The applicable constitutional provision, quoted in full above, provided, in part, that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws * * * of this State." Articles 1111 and 1112 of the statutes plainly confer upon the city the power to issue such bonds as those here involved without submitting the question to a vote of the citizens. The exception from the re-

quirement of submission to an election in such a case as this is found in article 1112, "except for purchase money, or for extensions, or to refund any existing indebtedness." Thus the charter and the statute are in conflict. And the conflict must by constitutional mandate be settled in favor of the statutory provision. It was unnecessary for the proposals for the issuance of the bonds and the giving of the respective liens as security for the payment thereof to be submitted to a vote of the citizens. The bonds and the deeds of trust executed to secure the payment thereof were valid. Huff *v.* City of Wichita Falls, 121 Tex. 281, 283, 48 S. W. (2d) 580, 583; McCutcheon *v.* Wozencraft, 116 Tex. 440, 294 S. W. 1105; Hunt *v.* Atkinson (Tex. Com. App.) 18 S. W. (2d) 594; Anderson *v.* Brandon, 121 Tex. 188, 47 S. W. (2d) 261; City of Beaumont *v.* Fall, 116 Tex. 314, 291 S. W. 202; Brown *v.* Fidelity Investment Co. (Tex. Com. App.) 280 S. W. 567; City of Vernon *v.* Montgomery (Tex. Civ. App.) 265 S. W. 188; City of Dayton *v.* Allred, 123 Tex. 60, 68 S. W. (2d) 172; Womack *v.* City of West University Place (Tex. Civ. App.) 32 S. W. (2d) 930, 932.

In City of Dayton *v.* Allred, 123 Tex. 60, 68 S. W. (2d) 172, loc. cit. 177, the Commission of Appeals, in passing on the question as to the necessity of submission of such a bond issue to an election, said: "In the instant case the city of Dayton has no sewer system and expects to use the money derived from the sale of these bonds in the construction, acquisition, and completion of such a system. It is our opinion that such a record justifies the conclusion that, in so far as the proposed sewer system here involved is concerned, the mortgage thereon is for purchase money within the meaning of article 1112. While it is for more than $5,000 being for purchase money, it is not required by this statute that a vote be had."

In Womack *v.* City of West University Place, supra, it was said: "The ordinance authorizing the issuance of the bonds is set out in appellant's petition. It recites that the bonds are to provide for refunding the existing indebtedness of the waterworks system and the extension of municipal water and sewer plants and systems. It will be observed that article 1112, supra, authorizes the issuance of bonds in

excess of $5,000 without a vote where the proceeds of the bonds are to be used to pay for the 'purchase money, or for extensions, or to refund any existing indebtedness.' In this case the bonds were to be used to refund existing indebtedness of the waterworks system and to extend the waterworks and sewer systems. So it appears that the ordinance was strictly in accord with the law, and no submission of the question to a vote was necessary."

In Huff *v.* City of Wichita Falls, supra, the Supreme Court said: "The courts have settled the question that charter provisions and city ordinances of home-rule cities are not valid when in conflict with the general laws of the state"—citing cases.

All of the appellant's assignments of error and the propositions thereunder are overruled.

The judgment of the district court is affirmed.

APPENDIX 3.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 9213.

CITY OF CORPUS CHRISTI, *Appellant,*

versus.

FRED P. HAYWARD et al., *Appellees.*

Appeal From the District Court of the United States for the Southern District of Texas.

(April 20, 1940.)

Before Foster, Holmes, and McCord, Circuit Judges.

HOLMES, Circuit Judge:

This appeal is from a judgment granting recovery upon coupons attached to water revenue bonds issued by appellant, the action being brought by appellees, as members of a bondholders protective committee, who are owners of the coupons.

The bonds were issued in series, during the years 1927-1929, for the purpose of financing the purchase of lands and riparian rights, the erection of a dam and reservoir, and the construction of the tanks, pipes, and other appurtenances necessary to the proper use thereof, as additions to the water system of the municipality. The issues were made pursuant to ordinances of the city council enacted under authority of Articles 1111, 1112, and 1113 of the Revised Civil Statutes of Texas of 1925, as amended in 1927. The bonds were secured by a mortgage covering the entire existing water system of the city, as well as the contemplated purchases, extensions, and improvements; they were payable only out of the revenue derived from the water system.

The bonds were sold, the project completed, and the city paid the maturing coupons for several years until, believing that they were uncollectible due to invalidity of the bonds, it denied liability thereon. Thereafter, anticipating trouble collecting these securities, and in order to centralize authority, minimize expenses, and facilitate the representation of their mutual interests in the matter, several of the holders of the bonds entered into a deposit agreement, under the terms of which they transferred all right, title, and interest in their bonds to a committee, appellees here, taking in return certificates of deposit in the fund created thereby. After various attempts had failed to collect the amounts claimed, this suit was brought.

The city claims that the court has no jurisdiction because the necessary diversity of citizenship is lacking, contending that appellees are merely collection agents for real parties plaintiff residing in Texas; that the deposit agreement and the transfers resulting therefrom were only colorable attempts to confer the benefits of federal jurisdiction upon bondholders not otherwise capable of suing in such court. This issue was settled in the case of *Bullard v. City of Cisco*, 290 U. S. 179, 78 L. Ed. 254, 54 Sup. Ct. 177, where the supreme court had before it a deposit agreement of bondholders identical in purpose, form, and content with the one under consideration. The court held that there was an actual and complete transfer of right, title, and interest in the bonds, and that the court had jurisdiction of the suit

brought by members of the committee constituted thereby, the transferees of the bonds, since it appeared (as it does in this case) that each member of the committee had the requisite diversity of citizenship, and the sum involved was above the jurisdictional amount.

The decision of the case on the merits requires construing Article 1112, *supra,* since the city contends that the bonds are invalid because the issues were not submitted to and approved by a majority vote of the qualified electors thereof, but were authorized only by an ordinance of the city council. The article provided that no such water system could be incumbered for more than $5,000, except for purchase money, or for extensions, or to refund any existing indebtedness, until such incumbrance had been authorized as aforesaid by a majority of the qualified voters of the municipality. The principal question is, therefore, whether or not the purposes for which the bonds were issued fall within the exceptions in the statute.

Appellees contend that the case of *City of Corpus Christi* v. *Flato,* 83 S. W. (2) 433, is *res judicata,* since that case involved these very bonds, and the city was a party to the action. Conceding without deciding that the city was a party thereto, nevertheless the decision is not *res judicata,* because there the court held that the particular plaintiff could not maintain that particular suit, and, after that holding, all other portions of the opinion were *dicta.* Neither is that case an authority which is binding upon us, because it was an opinion of a court of civil appeals, and was overruled by a later decision of the state supreme court holding directly to the contrary. This later case, *Radford* v. *City of Cross Plains,* 86 S. W. (2) 204, involved bonds issued for the same purposes as those here, and held that such construction must be considered *improvements* rather than *extensions,* within the meaning of the statute, and that the bonds were void. In that case the court also settled the claim of estoppel raised by appellees here, citing with approval the case of *Citizens Bank* v. *City of Terrell,* 78 Tex. 450, 14 S. W. 1003, and holding that, the bonds being issued in violation of law and therefore void, the city could not be estopped.

All other contentions of appellees are fully answered in the *Radford* case, *supra,* and in the decision of this court in *City of Hamlin* v. *Brown-Crummer Investment Co.,* 93 F. (2) 680. These decisions are directly in point and are controlling. The bond issues in suit being absolutely void, there can be no recovery on the coupons.

The judgment appealed from is reversed, and the cause is remanded to the district court with instructions to dismiss the suit.

A true copy. Teste:

(Sgd.) OAKLEY F. DODD,
Clerk of the United States Circuit Court
[SEAL.] *of Appeals for the Fifth Circuit.*

Office - Supreme Court, U. S.
FILED
AUG 23 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 224

FRED P. HAYWARD ET AL.

vs.

CITY OF CORPUS CHRISTI.

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI.

W. A. KEELING,
Attorney for Respondent,
City of Corpus Christi.

E. B. WARD,
A. N. MOURSUND,
HOWELL WARD,
R. BRISCOE KING, *City Attorney*
of City of Corpus Christi,
OF COUNSEL.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 224

FRED P. HAYWARD ET AL.

vs.

CITY OF CORPUS CHRISTI.

REPLY BRIEF OF CITY OF CORPUS CHRISTI

Reply to Petitioners' Summary Statement of Matter Involved.

---

1. The petition for certiorari undertakes to fix jurisdiction principally on the ground that the Circuit Court of Appeals erred in refusing to apply the rule of res judicata as barring respondent's defense that the bonds involved are invalid. The effect of the State court's judgment in *Harris v. Flato*, which petitioners pleaded, in this action is, of course, a question of local law, *Union etc. Bank v. Memphis*, 189 U. S. 71. Petitioners rely on decisions of New York and other foreign courts. No Texas case is cited by petitioners and we re-

spectfully submit that none can be found which sustains their contention. On the contrary, the facts of this case fail to bring it within the application of the doctrine.

The prior judgment of the State court referred to by petitioners as the *Flato Case* was not between the same parties as here, or their privies. The bondholders were not parties to that suit. The court sustained exceptions of defendant trustees seeking dismissal of the suit for that reason. *Exceptions VIII* (R. 901), *LXII and LXIV* (R. 927, 928). Attempted service on unknown bondholders was quashed on motions of the trustee defendants and amicus curiae. (R. 945-946.) The court expressly held that the defendant trustees named in the deed of trust securing the bonds had no capacity to represent the bondholders (*Exception LX*, R. 926). Such ruling having been made at the solicitation of the defendants therein, petitioner is now estopped to deny its force. *Sewell etc. Co. v. Booth etc. Co.*, 50 S. W. (2d) 793.

Further, in that suit the City of Corpus Christi was not an adverse party to such trustees. It asked no relief against them (R. 117-119), and they sought none against it (R. 934). Such trustee defendants, aside from their exceptions, pleaded only a general denial to Harris' petition. The State court, at the instance of the trustee defendants, ruled that plaintiff Harris could neither represent the City nor sue it, and exceptions were sustained dismissing it from the case. *Exceptions XIII, XIIIa, and XIIIb* (R. 904-905).

The application for writ of error, by Harris alone, was dismissed by the Supreme Court *for want of jurisdiction* (R. 476), which at the utmost could mean no more than that the Supreme Court did not approve the opinion of the Court of Civil Appeals, but found its judgment that Harris could not sue to be correct.

The trustee defendants contended on appeal that the bondholders were necessary parties and that the demurrer was properly sustained for that reason (R. 956) and their reply to the application for writ of error presented the same contention with three others, none of which went to the validity of the bonds. (R. 958-961.)

In the *Flato Case* the trial court first sustained all special exceptions, approximately eighty in number, and then sustained the general demurrer (R. 472-474). Many of these special exceptions raised matters in abatement of the suit.

In addition to other rulings herein mentioned, by the sustention of the exceptions of the trustee defendants, the trial court adjudged that Harris could not sue as a taxpayer because the bonds were payable solely from water revenues, *Exceptions X, XI and XII* (R. 902-903); that the City had an adequate legal remedy, a defense to any suit upon the bonds, *Exception XVI* (R. 906); and that Harris was guilty of laches, *Exception LIX* (R. 926). These rulings and others were complained of on appeal. In its opinion the Court of Civil Appeals held Harris guilty of laches, and that he had no capacity to sue for damages, and afterwards held the bonds valid, which question it was wholly unnecessary to go into if Harris could not be heard, as stated in the opinion.

The trial court in this case did not decide that the judgment in the *Flato Case* was res judicata of the issues herein, but only that it estopped the City to assert the invalidity of the bonds (R.177-178).

2. Respondent respectfully submits that the Circuit Court of Appeals in this case did not refuse or fail to apply the law of Texas "as expounded by decisions of that State." Its

decision that the bonds are invalid is in accord with the judgment of the State courts in *Radford v. Cross Plains*, 126 Tex. 153, 86 S. W. (2d) 204; *City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172; and *McCann v. Akard*, 68 S. W. (2d) 1033. It is also in accord with the earlier opinion of the Circuit Court of Appeals in *City of Hamlin v. Brown Crummer Co.*, 93 Fed. (2d) 690, certiorari denied 303 U. S. 664.

Petitioners would have those cases inapplicable because there the bonds were issued for "improvements" while those sued upon were for "additional water powers." But the facts here do not support such distinction, if any such is permissible.

The bonds in controversy were issued for the purpose, as stated in the contract, of "the construction of certain improvements to the waterworks system," and the bonds themselves recite as one of the purposes "to improve" the water system (R. 59-60). The ordinance for the 1927 bonds (R. 538) recites the necessity for certain "improvements and enlargements to the waterworks system" (R. 583). The word "improvements" appears in each bond ordinance (R. 628-670). By the deed of trust it was undertaken to create liens upon the then existing water system of the City, as well as upon the improvements and additions to be constructed. The improvements were so similar to those involved in the cases of *Radford v. City of Cross Plains*, 86 S. W. (2d) 204, and *City of Hamlin v. Brown Crummer Inv. Co.*, 93 Fed. (2d) 690, that no distinction can be made or is undertaken to be made.

Reply to Reasons Relied On for Allowance of Writ

1. The Circuit Court of Appeals applied the law as to

the merits of the controversy as established by the Supreme Court of Texas in the case of *Radford v. City of Cross Plains*, 126 Tex. 153, 86 S. W. (2d) 204, which is that Article 1112 of the Revised Statutes prohibits the encumbering of a water, sewer or light system by a city, for a debt in excess of Five Thousand Dollars ($5,000.00), except for extensions, unless such encumbrance is for the purchase money of the system covered by the encumbrance. Such decision is also supported by decisions of the Supreme Court Commission of Appeals in the cases of *City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172, and *McCann v. Akard*, 68 S. W. (2d) 1033, and was followed by the Honorable Circuit Court of Appeals in the case of *City of Hamlin v. Brown Crummer Co.*, 93 Fed (2d) 690, certiorari denied April 11, 1938, 303 U. S. 664.

2. The Supreme Court of Texas did not approve the opinion of the Court of Civil Appeals in the *Harris-Flato* case. It dismissed the application for writ of error for want of jurisdiction.

3. The Circuit Court of Appeals did not err in applying as the law applicable to the case the latest decision of the Supreme Court of Texas directly in point as to the proper construction to be given Article 1112 of the Texas Revised Civil Statutes, as the same obtained at the time of the transactions in question.

4. The judgment in the case styled *W. F. Harris, Relator, v. Edwin Flato et al.*, and in the Court of Civil Appeals as *City of Corpus Christi, ex rel. W. F. Harris, v. Flato et al.*, is not res judicata of the issues involved herein, for reasons herein pointed out, but which may be briefly summarized as follows:

(*a*) The bondholders were not parties, and, as held by

the court in that case, they were indispensable and necessary parties, under the Texas decisions.

(*b*) The trustees in the deeds of trust were not in privity with the bondholders and could not and did not represent them, and it was so held by such court at the instance of the trustees.

(*c*) Said court sustained exceptions of the trustee defendants, prior to passing on the general demurrer, calling for dismissal of the City as a party defendant, and that Harris could not sue for the City.

(*d*) The City was not an adverse party to the trustee defendants. It made no issue against them and they made no issue against it.

(*e*) Such court, before passing on the demurrer, sustained exceptions of trustee defendants, each praying for a dismissal of the suit, wherein it was contended that there was a misjoinder of actions; that there was a nonjoinder of indispensably necessary parties, the bondholders; that Harris had no capacity to sue, and that Harris was guilty of laches.

5. The Supreme Court of Texas has never held that a city in an action at law against it on bonds is estopped to urge that they are void unless it tenders back the benefits received under the void contract. Furthermore, petitioners did not hold all of the outstanding bonds, nor did they have any alternative plea seeking to recover property, and the City did not ask for any equitable relief.

ARGUMENT

Reply to Point I.

The judgment in the *Harris v. Flato* case is not res judicata of the issues involved in this case. The judgment involved as one reciting the sustaining of all special exceptions to Harris' Fourth Amended Original Petition, and then reciting the sustaining of general demurrers, and then adjudging because of such rulings that the cause be dismissed (R. 472-474). Res judicata does not apply for each of the following reasons:

1. Harris attempted to make the bondholders parties by publishing citation, which service was quashed on motions of trustee defendants and amicus curiae (R. 945-946). The court sustained special exceptions of the trustee defendants before ruling on their general demurrer, calling for the dismissal of the suit on account of the absence of bondholders, who are indispensably necessary parties (R. 901). *Exception VIII* (R. 927), *Exceptions LXII and LXIV*. The point, of course, could be raised by special exception, and in *Buie v. Cunningham*, 29 S. W. 801, it was held it could be raised on general demurrer. The contention that the trustee defendants represented the bondholders is not supported by law, and ignores the fact that at the instance of the trustee defendants the court sustained their special exceptions calling for rulings that they did not and could not represent the bondholders (R. 926, *Exception LX*).

2. The court by sustaining special exceptions of the trustee defendants held that Harris could not sue for the City and that Harris could not sue the City. These exceptions prayed for dismissal of the City from the suit (R. 904-905, *Exceptions XIII, XIIIa and XIIIb*).

3. The City did not by its pleadings raise any issue as to the validity of the bonds (R. 117-119). The trustees did not sue the City, or ask for any relief against it. In fact, aside from exceptions, they only pleaded general denials to Harris' suit (R. 934).

The City was not an adverse party to the trustees.

4. The court sustained exceptions whereby the trustee defendants asked that Harris' suit be dismissed on the ground that there was a misjoinder of causes of action (R. 899-900, *Exceptions IV and V*); also on the ground that he had no capacity to maintain the suit as a taxpayer because the bonds were payable solely out of water revenue and plaintiff had no special interest (R. 902-903, *Exceptions X, XI and XII*); also on the ground of laches on Harris' part; also on the ground that even if the bonds should be held void, the City had an adequate legal remedy, to-wit, a valid defense to any suit that might be brought on the bonds and coupons (R. 906, *Exception XVI*).

Because of the rulings so made it affirmatively appears that the suit was dismissed on various grounds not going to the merits before the general demurrer was ever considered.

By sustaining *Exception XVII* (R. 906-907), all portions of the petition wherein it was alleged that Harris sued as relator for the City, or that the City sued on relation of Harris, were stricken. In fact, practically all of the petition was stricken on exceptions. The court then sustained a general demurrer and refused to allow Harris to amend (R. 472-474).

The City did not except to the judgment, nor to any ruling. It gave no notice of appeal and did not appeal. It

filed no brief. It assigned no errors. It had no pleadings to support any if it had, nor were any issues raised against it. Its pleading is stated in the Record, pages 117-119.

Harris alone appealed, and he alone applied for writ of error. On submission day the then City Attorney filed a motion in the Court of Civil Appeals, asking that the judgment be reversed, which motion was not docketed, nor was any order entered thereon. It could not affect the appeal or the rights of the parties to the suit.

It is certain that the Supreme Court not only did not hold the bonds valid, but further that it knew them to be invalid for at that very time it had been considering the *Radford v. Cross Plains* case for some months, and a week thereafter handed down its decision in that case holding void bonds issued under facts so similar to those here involved that they cannot be distinguished.

The Supreme Court might well have concluded that Harris had no capacity to sue. The case of *Fisher v. City of Bartlett*, 76 S. W. (2d) 535, and *Womack v. City of West University Place*, 32 S. W. (2d) 930, were called to its attention by the appellees in the *Flato Case*.

It might have concluded that laches existed as found by the Court of Civil Appeals.

It might have concluded that the bondholders were indispensably necessary parties, and that, therefore, the judgment dismissing the case was correct, as was held in the case of *Buie v. Cunningham*, 29 S. W. 801.

The trustee defendants contended on appeal that the bondholders were necessary parties, and the demurrer properly

sustained for that reason (R. 956), and their reply to the application for writ of error presented the same contention, with three others, none of which went to the validity of the bonds. (R. 958-961.)

Harris' application for writ of error was dismissed for want of jurisdiction, which could mean no more in any event than that the court found the judgment to be correct, but did not approve the opinion of the Court of Civil Appeals.

As the bondholders were not cited there was a lack of identity of parties in the *Harris Case* and the present. In the former the bondholders were necessary parties, and the court so held and adjudged at the instance of the trustee defendants. Respondent cites in this connection: *Lowe v. City of Del Rio*, 122 S. W. (2d) 191 (Sup. Ct.); *Morrill v. Smith County*, 33 S. W. 899; *Buie v. Cunningham*, 29 S. W. 801-804; *Stratton v. Commissioners' Court*, 137 S. W. 1170; *State v. Bank of Mineral Wells*, 251 S. W. 1107; *Texas Electric & Ice Co. v. City of Vernon*, 252 S. W. 255; *Jones v. Clark*, 250 S. W. 217.

In the case of *Buie v. Cunningham*, supra, Judge HEAD said:

> "The owners of the bonds should also have been made parties defendant. Without these the court would have no power to declare void the bonds held by them, as it attempted to do in the judgment rendered. This question is fully considered in the case of *Board v. T. & P. Ry. Co.*, 46 Tex. 316, approved in *Dwyer v. Hackworth*, 57 Tex. 251, and in the *City of Brenham v. German-American Bank*, 144 U. S. 178, 12 Sup. Ct. 559. We do not mean to hold that all of the defects in the petition above indicated are of a nature to be taken advantage of by general demurrer, but some of them—notably the failure to make the owners of the bonds sought to be cancelled parties—can be."

In the *Lowe v. City of Del Rio* case, supra, the Supreme Court said:

> "The record before us discloses that many of the holders of the bonds and warrants involved have not been made parties to this suit. We also find that such holders who were made parties have not been served with citation and have not answered. This suit being for the cancellation of the bonds and warrants issued by the City, the owners and holders of such bonds and warrants are necessary parties to a suit to cancel them." Many cases are cited in support of the holding.

Petitioners insist, however, that the bondholders were represented because the indenture trustees were defndants and the plaintiffs are in privity with them, but the plaintiffs are not in privity with the trustees. The meaning of the word privity precludes any such holding, and the court in the *Harris v. Flato* case held to the contrary, as hereinbefore shown, at the instance of the trustees. Petitioners appeal to equity, and yet they seek to avail themselves of acts of the trustees, and at the same time repudiate their acts in getting the court to hold they could not represent the plaintiffs.

In support of the contention that the trustees were not in privity with the bondholders, we cite: *C. J.* 50, Sec. 3, p. 407; *Ladonia State Bank v. McDonald*, 7 S. W. (2d) 161, and cases therein cited; *Howell v. Bartlett*, 19 S. W. (2d) 104, and cases therein cited.

The trial court based its findings of privity on Sec. 6, of Article 10 of the deeds of trust (R. 795), which does not deal with suits to cancel bonds, and at the instance of the trustees it was held that they did not represent the bondholders in the Flato suit, notwithstanding Harris pleaded the very provision now relied on by plaintiffs. (R. 97, at bottom of page.)

Petitioners cite no Texas case in which exceptions such as those here involved were sustained prior to the general demurrer, in which effect is given to the sustaining of the demurrer as going to the merits.

The New York case of *Sheldon v. Edwards*, 35 N. Y. 279, so strongly relied on by petitioners, was one in which both pleas were submitted in the answer upon the merits of the case, and not, as petitioners say, separate rulings upon the merits and upon plea in abatement. In that case the court recognized that a different rule would apply as to facts herein involved because it said that if the preliminary issue involved the nonjoinder of parties, other questions might be presented in a subsequent action that were not in the case.

Here the question did not arise upon a general demurrer alone, but even if it had if there were two grounds, one of nonjoinder or want of capacity, and the other going to the merits, it would be presumed that the decision rested upon the nonjoinder or want of capacity. BIGELOW on *Estoppel*, p. 121.

The Texas cases cited by petitioners are cases dealing with general demurrers and special exceptions going to form, and not to misjoinder, nonjoinder, want of capacity, etc. In such cases the demurrer was sustained first, while here the exceptions were sustained first. It is true, and many cases are cited by petitioners to show it, that there may be two pleas to the merits involved, and the decision of each furnish ground for res judicata. Such cases do not militate against the rule that if there can be no hearing because of want of capacity, nonjoinder or misjoinder, there can be no adjudication.

If objection relating to abatement is apparent on the face of the petition it may be taken by exception instead of by

plea. *Tex. Jur.*, vol. 1, p. 155, Sec. 111, also p. 127, Sec. 92. *May v. Slade*, 24 Tex. 205; *Compton v. Stage Co.*, 25 Tex. Supp. 76. Such exceptions as go to matters in abatement should precede the general demurrer and general denial. *Compton v. Stage Co.*, supra.

In the case of *Rushing v. Mayfield Co.*, 104 S. W. (2d) 619-622, a plea of res adjudicata had been called "a plea in abatement." The Court of Civil Appeals held it was a plea in bar, and that therefore the court presumably passed on the general demurrer first. Judge FUNDERBURK said:

> "If the plea denominated 'plea in abatement' was such, in fact, in the sense that a failure to interpose it in the due order of pleading would constitute a waiver thereof, then the court by sustaining it and abating the suit by that very action deprived itself of jurisdiction to pass upon the general demurrer. Manifestly the court had no power to adjudge in response to a general demurrer that plaintiff's petition was insufficient to state a cause of action in a suit which had already been abated."

The Supreme Court reversed this judgment but did not question the correctness of the quoted part of the opinion.

In the *Bomar v. Parker* case, 4 S. W. 599, quoted from by petitioners, it was held that it must clearly appear that the demurrer went to the merits of the action or defense, otherwise it would be presumed that the objection went to form, and not to the merits. In this case the special exceptions sustained speak for themselves. The court by sustaining them granted prayers to dismiss because of misjoinder, nonjoinder, want of capacity and laches at least, and the general demurrer could have been sustained on nonjoinder of bondholders as held in the case of *Buie v. Cunningham*, 29 S. W. 801-804, and certainly could have been sustained

because of want of capacity to sue, which involved want of capacity to recover.

The case of *Nickelson v. Ingram*, 24 Tex. 631, was one in which it was denied that the claimed sole creditor applying for administration was in fact a creditor, and a judgment of the District Court was pleaded to establish that the claim had been held unfounded. The Court in stating the case said:

> "The defendants demurred to the petition, and set forth the following causes of demurrer, to-wit: 1st. That there was a misjoinder of parties defendant. 2d. That the petition showed that the maker of the note was a married woman, and did not state a case within the exception of the statute, in which a married woman could make a valid contract. 3d. That the said claim had not been sworn to, and presented for acceptance before suit brought, as required by law. 4th. That the petition set up a claim against the heir of the intestate, and set up the same claim as an individual debt of one of the defendants. 5th. That it sought to make the defendant, J. L. Nickelson, liable on a contract not made by him in person, or by his agent for him."

The demurrer was sustained.

The Supreme Court in its opinion held:

> "The suit which Mrs. Ingram and her husband instituted in the district court, against John L. Nickelson and Clara Margaret Nickelson, went off on demurrer. The effect of the judgment in that suit, was not to declare that the claim sued on was an invalid claim but merely to declare that the suit could not be maintained in the form in which it was then presented to the court, and against the parties then sued."

Surely the *Flato* case is a much stronger example of no adjudication on the merits, the exceptions going to mis-

joinder, nonjoinder of necessary parties, want of capacity on plaintiff's part, and laches on his part, having been presented and sustained before the general demurrer was reached.

The rule in Texas is that action on a general demurrer which does not of necessity determine the merits constitutes no bar to a subsequent action. 26 *Tex. Jur.*, Secs. 388-397, pp. 87-88. *Philipowski v. Spencer*, 63 Tex. 604-607; *Cavanaugh v. Cavanaugh*, 238 S. W. 1023; WELLS, *Res Judicata*, Sec. 466. In *Cavanaugh v. Romberg*, 247 S. W. 909, the court says that action on the general demurerr was not res judicata, employing this language:

> "Sustaining the general demurrer in a former action was not res adjudicata of the question of granting a temporary restraining order in this case. All that was adjudicated in the former case was that appellant had not alleged a cause of action. All that is shown by the finding was the appellant sought the same relief. The other grounds given by the judge for denying the order we deem well taken."

The language employed in *Murray v. City of Pocatello*, 226 U. S. 318, is apt here:

> "A defense mainly relied upon was res judicata. In 1909 the city brought a bill of equity in the circuit court, seeking to have the court fix reasonable rates. The defendant demurred for want of jurisdiction to give relief in equity and multifariousness. The decree was that the demurrer be sustained and the bill dismissed. The dismissal was in general terms, but with a reference to the opinion, reported in 173 Fed. 382. In the opinion, it is true, the court expressed the view that the ordinance relied upon by the defendant was not affected by the subsequent statute, but the point decided, and the only point that could be decided, was that the demurrer should be upheld, and that the court was without juris-

> diction. The demurrer excluded a decision upon the merits, and even if the decree referring to it did not have the same effect by itself, the opinion to which the decree also refers would show the same thing. Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in *Ontario Land Co. v. Wilfong*, 223 U. S. 543, 559, L. Ed. 544, 551, 32 Sup. Ct. Rep. 328, and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached."

Petitioners make much of the Court of Civil Appeals opinion wherein it is stated the appeal presents for review the ruling sustaining the general demurrer but the opinion among other things holds that Harris had no capacity to sue and was guilty of laches as well as overruling all of Harris' assignments of error, many of which were aimed at the rulings on the special exceptions.

Petitioners contend that an adjudication may take place between coparties, and imply that such an adjudication might exist as between the City and the trustee defendants. The answer is that no judgment was entered as between them, and no issues were made by either against the other by pleadings.

As to the effect of judgment between coparties, *Tex. Jur.*, vol. 26, Sec. 460, p. 232, lays down the following rules:

> "The general statement, so frequently found in the decisions, that a judgment is binding upon the parties to the suit in which the judgment was rendered is, as a matter of fact, too broad, because a judgment is usually binding only in respect to adversary parties. In other words, a judgment for or against two or more joint parties does not ordinarily determine their respective rights as between themselves, and they may neither rely

upon it in regard thereto nor assail it, in any subsequent litigation between them, unless they filed cross-pleadings putting such rights in issue and the judgment adjudicated them."

In the case of *James v. James*, 164 S. W. 47, the Court said:

" 'Parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversary parties in the original cause of action.' Freeman on Judgments, Sec. 158. See also, Van Fleet's Former Adjudication, p. 569; *G., C. & S. F. Ry. Co. v. G., H. & S. A. Ry. Co.*, 83 Tex. 509, 18 S. W. 956; *Sandoval v. Rosser*, 26 S. W. 932."

Petitioners make the broad contention that a judgment between parties is conclusive of every matter which the parties might have litigated as against each other. This is not correct. Our courts recognize modifications as to this doctrine, 26 *Tex. Jur.*, Sec. 419, p. 137; *Moore v. Snowball*, 98 Tex. 16. The adjudication must be upon issues made by the pleadings of the parties or necessarily involved in such issues as are pleaded.

Petitioners say that the facts involved in *Louis v. Brown Township*, 109 U. S. 162, were almost identical with those in the case at bar. That is an error because the opinion shows that the codefendant filed a cross-bill raising an issue between himself and the trustee which was expressly decided. Here neither the trustees nor the City filed a cross action, nor was there any adjudication as between them.

Petitioners rely upon the case of *Corcoran v. Chesapeake, etc., Canal Co.*, cited page 22 of their petition, but it appears from that case that it was only held that if codefendants have had a hearing and an opportunity of asserting their rights, they are concluded between themselves so far as the

judgment affects rights presented to the court and passed upon by its decree. It is obvious that that case cannot aid petitioners. They also cite the case of *Gordon v. Thorpe*, 53 S. W. 357. Gordon sued the City and Thorpe for the title to land. The city alleged it had conveyed the title to Thorpe and sought a judgment for foreclosure of its vendor's lien for the purchase money. Thorpe defeated Gordon's claim for the land. It was held that the City had conveyed the land to Thorpe and that this was binding on a creditor of the City who subsequently levied an execution upon the land as the property of the City. It is evident that the case cannot aid petitioners. It merely recognizes that the pleadings of codefendants in a suit may bind them as to each other when judgment has been rendered thereon.

The case of *Carnes v. Carnes*, 26 Tex. Civ. App. 610, 64 S. W. 877, cited by petitioners, has been examined. It does not support the contention made.

The case of *Souffront v. La Compagnie des Sucreries*, 217 U. S. 475, 54 L. Ed. 846, was one involving peculiar facts. Under the Spanish law vendors of property after parting with property could sue for the benefit of the vendees. A judgment in such a suit was held binding upon the vendees in a subsequent suit. Certainly this case can have no application here.

The case of *City of Palestine v. City of Houston et al.*, 262 S. W. 215, so strongly urged by petitioners, is of no aid to them. It merely announces the rule that a judgment in a class suit, brought by a city and citizens to prevent a railroad from moving its general offices, is binding on all the citizens of the State, and not merely those of the county in which the suit was brought.

It is respectfully submitted that the criticism of the opinion of the Circuit Court of Appeals, wherein it uses the word dictum, is unwarranted. Certainly if the case was one which could not be heard on the merits on account of laches or want of capacity to sue, anything said about the merits was immaterial, and therefore dictum.

The doctrine of res adjudicata is after all only a rule of public policy of repose from continued litigation. It is not a rule designed to prevent a litigant from having his case heard on the merits. While it will bar a new trial of a case decided on the merits erroneously, it will not be invoked where its enforcement will produce manifest injustice. *Vann v. Bank*, 204 S. W. 1062, 1069. The bondholders eluded the jurisdiction of the State court. They now seek to say that although they were held to be not before the State court, they were in fact there. The previous case did not decide the merits of issues here involved.

The respondent respectfully submits there is no merit in petitioners' contention.

Reply to Point II.

The decision in *Radford v. City of Cross Plains* establishes the law in Texas to be that no water system can be encumbered without a vote for a sum in excess of $5,000.00 unless it be for purchase money of such system.

The opinion of the Court of Civil Appeals in the *Flato Case* was never approved by the Supreme Court. It dismissed the application for writ of error for want of jurisdiction. At that very time it had been considering the *Radford Case* for several months, and handed down its decision

a week after dismissing the *Flato Case*. If it had approved the opinion of the Court of Civil Appeals and found the bonds valid in the *Flato Case*, it would have refused the writ of error. By its action in dismissing for want of jurisdiction it refused to approve the opinion, and it seems to follow inevitably that such refusal was because it disagreed with the Court of Civil Appeals as to the validity of the bonds involved in the *Flato Case*.

The Supreme Court, under the statute, was not required to grant a writ if it found that on account of laches, or want of capacity on Harris' part to sue, or because of misjoinder or nonjoinder of necessary parties, the judgment of dismissal was correct. Nothing said in a motion for rehearing could change the legal effect of such action of the court.

Under Article 1111 the general power was given to mortgage the water, sewerage and gas systems, all or one, but under Article 1112 this would have to be done by vote, if exceeding $5,000.00, unless the debt was for purchase money of the system mortgaged. It was so held by the Supreme Court in the case of *Dayton v. Allred*, 68 S. W. (2d) 172, and this case was cited in the *Radford Case*. In that case it was undertaken to encumber the existing water system and the new sewer system for the price of the sewer system. This was held invalid as to the water system, and that therefore the bonds were void. In *McCann v. Akard*, 68 S. W. (2d) 1033, the Supreme Court Commission of Appeals held that a pledge of income is an encumbrance of the system, saying:

> "As we understand this record, the City owns and operates its own waterworks system. It is proposed by this contract to create a deed of trust lien on the net income of such system for $15,000.00. This lien is

> not for purchase money of such system, or to refund any existing indebtedness thereon, or for repair or reconstruction thereof. The proposition to create the lien on the waterworks system has never been authorized by a majority vote of the qualified voters of the City. Such a lien is prohibited by our statutes."

Petitioners seek to distinguish the *Radford Case* on the ground that the water system was encumbered to obtain a sewer system. What difference would that make when by virtue of Article 1111 and 1112 both systems could be encumbered by a vote, but without a vote no system can be encumbered except for its purchase money, unless there is an exception by reason of the amount being less than $5,000.00? Petitioners insist on calling the improvements and enlargements here involved "additional water powers," but the *Radford Case* and the *City of Hamlin Case* involved improvements practically identical in character. However, it is immaterial what they are called, as the then owned system cannot be encumbered to pay for such additions or improvements, if they exceed $5,000.00 in value.

It is sought to distinguish this case from the *Radford Case* on the ground that in that case, the City being plaintiff, and suing for cancellation of the bonds, disclaimed the improvements, while in this case the petitioners sued on the bonds, and the City defended on the ground that they were void, and did not tender to plaintiffs, who did not even hold all of the bonds, the improvements. All that the Supreme Court said in the *Radford Case* was:

> "We are not called on to decide whether or not the plaintiffs in error had a right to reclaim the reservoir and the pipe line which were constructed under the contract, as the city has made a disclaimer of any right or title to said property."

The Supreme Court did not hold that in an action at law, the void bonds could be held valid because of failure to tender improvements, nor did it even hold that the bondholders could recover the improvements, there being several Texas decisions to the effect that the contractor was the one who had such right. If the bonds are void under the *Radford Case*, the Circuit Court of Appeals was correct in so holding, and it was also correct in holding that in this case the City could not be denied its legal defense, because of any failure to tender improvements to part of the bondholders, who pleaded no willingness to rescind, and no alternative demand.

Reply to Point III.

The City of Corpus Christi, being sued in an action at law, was not estopped to set up that the bonds were void notwithstanding that it did not tender to plaintiffs the improvements constructed by Smith Brothers, Inc.

The rulings of the trial court in sustaining the contention that the City was estopped to rely on its legal defense because it had received and retained the benefits of the void contract finds no support in the Texas decisions, and we believe no support in any decisions anywhere. Such rulings violated the fundamental rule that if a contract is void no recovery thereon can be had if the action is defended on that legal defense.

The Texas courts permit a recovery on quantum meruit, which is contrary to the decisions of the Federal courts and wholly illogical, as it is making a contract for the parties. Such was the *Sluder v. City of San Antonio* case quoted from by petitioners. This was not a suit on quantum meruit, so all such cases may be disregarded.

In the *Radford v. Cross Plains* case, 86 S. W. (2d) 204, the court said:

> "These bonds having been issued without a vote of the people, in direct contravention of the statutes, were void. As the City not only had no authority to issue same without a vote of the people, and as they were issued in violation of law, the City was not estopped to question their validity. Citizens Bank v. City of Terrell, 78 Tex. 450, 14 S. W. 1003."

In *Citizens Bank v. Terrell,* 14 S. W. 1003, the court said:

> " * * * When the debt is void in its inception for want of authority to create it, no subsequent ratification of it by the collection of taxes, or otherwise, can give to it any validity; nor can there then be such a thing as a bona fide holder of the obligations, with a right to collect them, notwithstanding the want of power in the City to create the debt."

In the case of *Southwestern Lloyds vs. City of Wheeler,* 109 S. W. (2d) 739, involving the validity of certain city warrants, the Supreme Court Commission of Appeals held that there should be no estoppel allowed under the facts, although the city had retained and was still retaining the property and although the buyer of the warrants had been furnished a complete transcript, certified to by the City Secretary, purporting to show all proceedings necessary to valid warrant issues including a levy of tax and had accepted the warrants in payment upon the faith of such transcript and without actual notice of any infirmities.

In the case of *Grimes County v. W. L. Slayton & Co.,* 262 S. W. 209, the court said:

> " * * * Where there is a total want of power on

> the part of a county to issue bonds or refunding warrants, in virtue of constitutional or statutory restriction, the county will in no case be estopped from questioning and pleading such lack of power, even against a bona fide holder."

The petitioners rely upon two Texas cases. The case of *Hill County v. Bryant & Huffman*, 16 S. W. (2d) 513, was one in which an engineering firm which had received $13,000.00 too much under a contract in fact invalid sought to retain the excess by attacking the validity of the contract. The Court held that having received the benefit of the loan they were in no position to question its validity.

The Court referred to the action of the officials as ultra vires, but held that justice required the return of the money. It was not necessary to, and the court did not, sustain the validity of the contract in order to recover back the money.

The case of *Payne v. First National Bank of Columbus*, 291 S. W. 209, was one in which estoppel was based upon extraneous fraud as well as in the procedure by the City officers, and upon the fact that the City had the power and authority to build bridges, and by its fraud obtained the money for the warrants and used it to build a bridge. The facts were exceptional, and the case in no way commits the Texas courts to the proposition contended for by petitioners.

In the case of *City of Hamlin v. Brown Crummer*, 93 Fed. (2d) 680, it was expressly held that the bonds were nullities and "may not be recovered on." The Court also stated that since the City had disclaimed as to the property the bondholders had no equity on which to found a claim against the water system. The Court had rejected the estoppel theories urged in the case, and certainly did not hold

that the City was estopped by receiving benefits and afterwards changed such estoppel by disclaiming the property.

It is well settled that there is no requirement in a suit on the contract that a defendant tender the money or property acquired under an invalid contract to permit him to assert such invalidity as defense to a suit on the contract.

In addition to the cases cited there we submit the following:

3 McQuillin, Mun. Corp., 2d ed., Sec. 1283;
City of San Antonio v. McKenzie, 88 S. W. (2d) 622;
M.-K.-T. Co. v. Krumseig, 172 U. S. 358, 19 Sup. Ct. 182;
Pullman's, etc., Co. v. Central, etc., Co., 171 U. S. 138;
Columbus v. Mercantile Trust Co., 218 U. S. 145;
Carr v. Terminal Co., 150 N. E. 262;
McIver v. Clark, 10 Sou. 581 (Miss.).

In *Buchanan v. Litchfield*, 102 U. S. 278, the Court said:

> "Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the City of Litchfield with a system of waterworks, the benefits of which are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.
>
> "Whether the City is under a legal obligation to make restitution of the money, obtained without authority of law, that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion."

Apparently the petitioners had in mind the maxim that he who seeks equity must do equity. This doctrine does not apply to this case. In Sec. 153, 21 *Corpus Juris*, at p. 176, the writer says:

> "The maxim does not apply to cases where a party is not seeking to avail himself of the ordinary equitable jurisdiction of the court, but is seeking to avail himself of a substantial right under the express provisions of a statute * * *. Defendant may rely upon a legal defense, without reference to the maxim, and, if such defense is established is entitled to prevail."

It is thus held that where a defendant does not seek any affirmative equitable relief he does not have to offer to do equity.

In the case of *Hernin v. City of Coquille*, 21 Pac. (2d) 1078, the Supreme Court of Oregon had before it a case in which the pleadings were similar to those here involved. The court held the plea of estoppel to be without merit and sustained the legal defenses to the contract.

In *Cameron County Water Improvement District v. De la Vergne Engine Company*, 93 Fed. (2d) 373, Judge HOLMES says:

> "The appellee relies strongly upon ratification and estoppel, but neither may be invoked to enforce a contract entered into in violation of a constitutional provision which was intended to safeguard taxpayers against such financial difficulties as now envelop this improvement district * * *. No vote of the taxpayers having authorized the indebtedness, the contract is a nullity, because opposed to the Constitution, laws and settled public policy of the State. Complete performance of the contract by appellee does not prevent the district from pleading its want of power to enter into the contract or the illegality of its terms."

This but reiterates a doctrine well recognized by both the Supreme Court of the United States and the well considered Texas cases.

In this case the bondholders do not even own all the outstanding bonds. They have not pleaded any alternative demand seeking to recover the property; nor do they seek rescission. The City stands upon its legal defense to the bonds, and has no cross action seeking equitable relief.

It is respectfully submitted that the City was not precluded from defending on the ground of invalidity of the bonds, by reason of its having failed to make some kind of an offer to plaintiffs as to property or benefits.

Reply to Point IV.

The bonds were issued in violation of the statutes and were void and the City was not estopped to dispute their validity. In holding that the bonds were void the Circuit Court of Appeals followed its decision in the case of *City of Hamlin v. Brown Crummer Co.*, 93 Fed. (2d) 680, certiorari denied 303 U. S. 664. The improvements involved in that case were so strikingly similar to those involved in this case that no distinction can be made or is undertaken to be made with regard thereto. Petitioners seek to escape the effect of the decision in the case of *City of Cross Plains v. Radford* by reason of the fact that in such case the water system had been encumbered for improvements to the water system and sewer system but the construction placed by the Court upon Articles 1111 and 1112 of the statutes was not based on the fact that the improvements were to the two systems. The Court held that the power of the City to do what it attempted to do was limited to the accomplishment

of the objects expressly mentioned in Article 1111 and that there was the further limitation that the system could not be encumbered without the vote of the people except for extensions; that Article 1112 precluded the encumbering of any system already owned by the City except for purchase money of such system unless the encumbrance was for less than $5,000.00 or for extensions. In this connection respondent shows that the statute involved in the case at bar is the same as it was at the time of the transactions in the *Radford Case*. The question also obtained in this case whether the amendment to such statute providing for extensions was a valid one but since petitioners do not contend in this case that the improvements constituted extensions, it became unnecessary to present or argue the effect of the amendment to the statute which was considered in the Radford case. In the Radford case, the Court discussed the case of *City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172, and approved the holding there made. These two cases, together with the case of *McCann v. Akard*, 68 S. W. (2d) 1033, definitely settle the law in Texas to be that Article 1112 prohibits the encumbering of a system or the income therefrom except for purchase money of such system or for one of the excepted purposes not involved in this case.

The contention of estoppel by recitals in the bonds was expressly denied in the *Hamlin Case* and was also denied in the *Radford Case*. It is not deemed necessary to reply further to the petition than to say that none of the matters relied upon for estoppel have any application in a case like the one at bar where the bonds were issued contrary to the provisions of the statute.

CONCLUSION

Petitioners, like all other holders of bonds, consider it a miscarriage of justice if they are not permitted to collect the bonds regardless of their legality. They wholly overlook the rights of taxpayers of a municipality to be protected from violation of the provisions of the laws of the State and the injustice of imposing obligations on the people of the city without their consent. The Circuit Court of Appeals in this case has applied the safeguards of the law and no miscarriage of justice has resulted.

The City of Corpus Christi respectfully prays that the petition for certiorari be denied.

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